

No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

MARSHALL B. WOODWORTH,

ROBERT T. DEVLIN,

Attorneys for Plaintiff in Error.

S. LUKE HOWE,

NATHAN C. COGHLAN,

ANTHONY CAMINETTI, JR.,

Of Counsel.

Filed

OCT 17 1914

F. D. Monckton,
Clerk.

Filed this.....day of October, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

INDEX TO ARGUMENT.


	Pages
I. The "White-slave traffic Act" is unconstitutional	17 - 19
II. The trial Court erred in not holding that the facts proved by the prosecution, assuming them to be true, did not constitute such an offense as was intended by Congress to be prosecuted by virtue of the act known as the "White-slave traffic Act", etc.	20 - 84
III. The trial Court erred in charging the jury, and in its rulings throughout the trial and during the arguments of the prosecuting attorneys, to the effect that "if he (defendant) has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence".....	85 - 146
IV. The Court erred in its refusal to instruct the jury as to accomplices, etc.....	147 - 169
V. The Court erred in refusing to instruct the jury to acquit, and in refusing to grant the motion in arrest of judgment, upon the ground that there was no evidence sufficient to justify submitting the case to the jury or to sustain the judgment of conviction	170 - 206
VI. The prosecuting attorneys committed reversible errors in making improper comments and arguments to the jury, and the trial Judge likewise committed error.....	207 - 248

	Pages
VII. The trial Court erred in refusing to give the several instructions requested on behalf of the defendant, advising the jury that mere presence by the defendant Caminetti, without any act of participation on his part, did not constitute the commission of any offense so far as he was concerned..	249 - 260
VIII. The trial Court erred in refusing to instruct the jury with reference to the \$20 given to Lola Norris by the defendant but which she never used to purchase any transportation whatever	261 - 263
IX. The trial Court erred in refusing to instruct the jury with reference to certain matters affecting the credibility of Lola Norris..	264 - 266
X. The trial Court erred in refusing to instruct the jury that circumstances of suspicion are not proof of guilt, etc.....	267
XI. The trial Court erred in failing to give certain instructions requested on behalf of defendant as to circumstantial evidence..	268 - 271
XII. The trial Court erred in refusing to instruct the jury that the intent denounced by the "White-slave traffic Act" must have been formed and existed at the time the transportation was furnished or at least while the defendant was within the State and Northern District of California and before he had passed the boundary line dividing California from Nevada, etc.....	272 - 278
XIII. The trial Court erred in refusing to give certain instructions requested on behalf of the defendant relating to the question of the specific intent denounced by the "White-slave traffic Act".....	279 - 297
XIV. The trial Court misled the jury as to the real issue and thereby denied the defendant a fair and impartial trial.....	298 - 314

Carroll A)

876

168



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

Pages

- XV. The trial Court erred in refusing to give certain instructions requested on behalf of the defendant advising them with reference to certain admissions of the defendant, etc.....315 - 317
- XVI. The trial Court erred in refusing to instruct the jury that they should not permit themselves to be influenced by the fact that Maury I. Diggs, the defendant in another case, may or may not have been guilty, etc.318 - 319
- XVII. The trial Court erred in instructing the jury that the evidence introduced by the government, if believed by the jury, was sufficient in law to make a case against the defendant under all four counts of the indictment320 - 321
- XVIII. The trial Court erred in its refusal to instruct the jury as to any statement or declaration by one conspirator, made after the consummation of the conspiracy, etc. 322
- XIX. The trial Court erred in admitting certain testimony as to statements made by Diggs even though in the presence of the defendant under the circumstances disclosed...323 - 325
- XX. The trial Judge erred in his rulings that the prosecution amounted practically to one for conspiracy326 - 328
- XXI. The trial Court erred in permitting the witness W. E. Doan, official shorthand reporter of the Superior Court of Sacramento, to testify to certain admissions made by the defendant and by Lola Norris.329 - 345

- XXII. The trial Court erred in refusing to permit the attorney for the defendant in his opening statement to the jury, to read those portions of the "White-slave traffic Act" under which the defendant was indicted and was then on trial, and in refusing to permit the indictment to be read to the jury, and in making prejudicial remarks in his rulings in that connection.....346 - 355
- XXIII. The trial Court erred in its rulings and in its comments and the prosecuting attorneys likewise erred in the questions propounded and the comments made by them, with reference to the alleged conduct of the defendant Caminetti with certain girls other than Lola Norris and Marsha Warrington356 - 362
- XXIV. The trial Court erred in refusing to permit the defendant to testify that he had never read the "White-slave traffic Act".....363 - 364
- XXV. The trial Court erred in permitting Marsha Warrington to testify as to her acts of sexual intercourse with Maury I. Diggs with which the defendant Caminetti had nothing whatever to do and was not even aware365 - 369
- XXVI. The trial Court erred in permitting Marsha Warrington to testify to a conversation she had with Maury I. Diggs and Lola Norris not in the presence of the defendant370 - 372
- XXVII. The trial Court erred in refusing to permit a witness called on behalf of the defendant to testify as to whether Miss Warrington did not appear worried or excited when the witness had a conversation with her with reference to a publication in the newspaper in Sacramento, the "Bee"... 373

XXVIII.	The trial Court erred in refusing to permit a witness called on behalf of the defendant to testify as to the effect upon the defendant of a conversation he had had with the defendant.....	374
XXIX.	The trial Court erred in permitting evidence to go to the jury with reference to the amount of salary due the defendant when he left Sacramento and some moneys that were then due by him to the witness O'Brien, called on behalf of the defendant	375
XXX.	The trial Court erred in admitting much extraneous and remote matter, prejudicial to the defendant, as disclosed by the assignments of errors.....	376 - 377
XXXI.	The trial Court erred in admitting the testimony with reference to the sale of railroad tickets and in admitting the railroad tickets themselves	378
XXXII.	The trial Court erred in admitting certain statements made by Maury I. Diggs, and which were prejudicial to the defendant Caminetti	379 - 381
XXXIII.	The trial Judge erred in making a remark in the presence of the jury deemed to be improper and to which exception was taken	382
XXXIV.	The Court erred in not granting the motion made on behalf of the defendant at the outset of the case to transfer the trial of the case to Sacramento, where the offenses were charged in the indictment to have occurred and where the defendant and the principal witnesses all resided...	383 - 389
Conclusion	390 - 399
Appendix	i - vii

No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error, F. Drew Caminetti, was indicted and convicted in the District Court of the United States, in and for the Northern District of California (First Division), Honorable William C. Van Fleet presiding at the trial, for a violation of the Act of Congress of June 25, 1910 (36 Stat., 825), designated, in section 8 of the Act, as the "White-slave traffic Act".

The indictment contained four counts. After a trial lasting several days, the plaintiff in error (hereinafter designated as the defendant) was convicted on the first count, and acquitted on the other

three counts, of the indictment. Motions for a new trial and in arrest of judgment were denied. The defendant was sentenced to imprisonment in the Federal penitentiary at McNeil's Island, State of Washington, for the term of eighteen months and fined in the sum of \$1500.00. From the judgment of conviction, he prosecutes this writ of error.

As above stated, the defendant was indicted on four counts, the first two counts being for violations of section 2 of the Act of June 25, 1910, designated as the "White-slave traffic Act",* and the last two counts being for violations of section 3 of that Act. The first count of the indictment (the only count upon which the defendant was convicted) charged him with having, on the 15th of January, 1913, *at Sacramento*, State and Northern District of California, transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce, from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the said Lola Norris should be and become the concubine and mistress of the defendant Caminetti. (See Indictment, Transcript of Record, p. 2.)

The second count charged him with a similar offense as to one Marsha Warrington, there being,

* Note: We append, for convenience, as an addendum, the complete text of the "White-slave traffic Act".

however, this difference: the second count alleged that the immoral purpose was that the said Marsha Warrington should be and become the concubine and the mistress, *not* of the *defendant Caminetti*, but of one *Maury I. Diggs*.

The third and fourth counts charged the defendant with having persuaded, induced and enticed Lola Norris, in count three, and Marsha Warrington, in count four, respectively, to go from Sacramento California, to Reno, Nevada, for an immoral purpose, to wit, that the said Lola Norris should become the concubine and mistress of the defendant, and the said Marsha Warrington should become the concubine and mistress of Maury I. Diggs.

The defendant was acquitted of having had anything to do with the transportation, in violation of section 2 of the "White-slave traffic Act", of Marsha Warrington, and was also acquitted of having persuaded, induced or enticed either Lola Norris or Marsha Warrington, in violation of section 3 of the Act, to accompany him on the trip from Sacramento, California, to Reno, Nevada. The jury, by its verdict, in effect found and decided that the departure from Sacramento, California, of Lola Norris and Marsha Warrington with the defendant Caminetti and Maury I. Diggs was voluntary on their part and of their own free will and accord, and not through any persuasion, inducement or enticement on the part of the defendant.

It will be conceded by the prosecution, at the outset, that the case at bar is devoid of the slightest element or feature of commercialism.

By this, we mean to say that there is not the slightest pretense in the case at bar, based on anything in the evidence, that the defendant ever intended to profit financially by reason of his escapade with Lola Norris or that he ever contemplated that she should become a prostitute or be debauched by him with the intent or purpose that he should ever receive any of her earnings as a prostitute.

The prosecution excited national attention, partly because it was considered, in view of the facts elicited at the trial, as a test case of the scope and operation of the "White-slave traffic Act"; partly because of the prominence, politically and socially, in California of defendant's father and mother; and partly because of certain political aspects injected, or attempted to be injected, into the case at its inception.

The government retained as special counsel to prosecute Hon. Matt I. Sullivan and Mr. Theodore J. Roche, eminent members of the bar of the State of California.*

The trial lasted several days and was vigorously contested. Numerous exceptions were taken to the rulings of the Court admitting and rejecting evidence, to remarks and comments of the Court itself,

* Note: Hon. Matt I. Sullivan has since taken his seat as Chief Justice of the Supreme Court of California, by appointment from Governor Hiram W. Johnson, in succession to the late Chief Justice W. H. Beatty.

to many portions of the opening and closing arguments of the special counsel for the prosecution, to the instructions of the Court in charging the jury and to the failure of the Court to give instructions requested on behalf of defendant, as well as in overruling the demurrer to the indictment, in denying the motion to instruct the jury to acquit and in denying the motion in arrest of judgment. The assignments of errors are numerous. Only the principal ones of these will be referred to and relied upon to obtain a reversal.

An examination of the evidence, contained in the bill of exceptions (Transcript of Record, pp. 143-411) will make it difficult to conceive how the jury ever arrived at its verdict of guilty on the first count of the indictment and ever could have found, *beyond all reasonable doubt*, that the defendant transported, or caused to be transported, or aided or assisted in obtaining transportation for, or in transporting, Lola Norris from Sacramento, California, to Reno, Nevada, in interstate commerce, for any immoral purpose whatsoever. The evidence absolutely fails to show that the defendant did anything either to transport, or to cause the transportation, or to aid or assist in obtaining transportation, for Lola Norris. The evidence shows that it was Maury I. Diggs who bought the ticket for Lola Norris. The defendant did not purchase a single ticket; he did not furnish any of the money with which the ticket for Lola Norris was actually purchased, nor did he agree to repay any money advanced by Diggs. He

did not purchase the Pullman ticket for Lola Norris, nor did he contribute a cent to its purchase. All this was done by Maury I. Diggs. The indictment did not charge the defendant with a conspiracy with Maury I. Diggs to violate the "White-slave traffic Act". There is absolutely no evidence of any act done by the defendant, under the first count of the indictment, to support his conviction either as a principal or as an accessory, and the motion to acquit should have been granted, or, thereafter, the motion in arrest of judgment.

We challenge the learned and astute prosecuting attorneys to point out, in their Reply Brief, one act of a material, tangible or substantial character which the evidence shows that the defendant did to (1) transport, or (2) cause to be transported, or (3) aid or assist in transporting, in interstate commerce, Lola Norris, from Sacramento, California, to Reno, Nevada. As already stated, the defendant was not on trial for a conspiracy to violate any law of the United States, and yet his conviction on the first count of the indictment can be reconciled on no other theory than that the jury considered, under the rulings and remarks of the trial Judge, the act of Diggs in buying the tickets, both railroad and Pullman, as the act of the defendant Caminetti, upon the false and erroneous theory that they acted in concert. The trial Judge, in his rulings and remarks and instructions to the jury, undoubtedly gave rise to this erroneous view and misled the jury into the false notion that the prosecution was, in

effect, one for conspiracy, and that the act of Diggs was the act of Caminetti. Nothing could have been more misleading and erroneous! Nothing more fallacious and prejudicial to the defendant Caminetti!

Furthermore, the testimony of Marsha Warrington and of Lola Norris and of the defendant himself show that the intent and purpose—the actuating motive—in leaving Sacramento was absolutely at variance and totally inconsistent with the intent and purpose denounced by the “White-slave traffic Act” and alleged against the defendant in the indictment.

The indictment alleged that the immoral purpose and intent was, “to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant”. (Transcript of Record, p. 2.)

Marsha Warrington’s testimony was totally inconsistent with any such intent or purpose. She testified as follows:

“Q. You did not use that language. Were you asked this question, reading from page 381 of Miss Warrington’s testimony, of the previous trial, a question put by the Court: ‘Q. He is asking you whether Mr. Diggs said in his talks with you in any specific way that he wanted you to go there for the purpose of living with him? A. No, he did not say that.’ ‘Was that question asked of you and did you make that answer?’

MR. ROCHE. What page is that?

MR. HOWE. Page 381.

THE COURT. What is the object of this?

Mr. HOWE. 'I want to show why she went to Reno.

The COURT. She has not on this occasion testified that any specific suggestion of that kind was made.

Mr. HOWE. But I am asking her if any specific suggestion was made.

The COURT. You can ask her what they went to Reno for.

Mr. HOWE. Q. Was there any specific suggestion made by Mr. Diggs that you should go there for the purpose of living with him? A. No. He said he would get a divorce and marry me. *Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him.*" (Transcript of Record, pp. 269, 270.)

The testimony of Lola Norris was absolutely at variance with any such intent or purpose. She testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

The testimony of the defendant himself is utterly at variance and inconsistent with the intent and purpose set out in the indictment.

We set out the testimony of the defendant in full. We do so, for the convenience of the Court, in view of the fact that there is no printed transcript of record. His testimony is as follows:

“My name is F. Drew Caminetti. I remember having a conversation with Miss Marsha Warrington during the latter part of February, 1913, on ‘P’ Street in the City of Sacramento, with reference to a publication in the ‘Sacramento Bee’. She told me that a reporter on the ‘Sacramento Bee’, a Mr. Putnam, who I believe is the sporting editor of the ‘Bee’, had told her that another reporter had discovered that she and Lola Norris, Mr. Diggs and I were going around together and that he had written an article about it; that her friend Mr. Putman had used his influence and had the article suppressed; I asked her if she had acknowledged the fact to him and she said that she had. That was the first time I had heard anything about a publication in the ‘Bee’. In the latter part of February, 1913, I had a conversation with Mr. O’Brien relative to a statement made by Miss Warrington’s uncle, in which possible harm to me that might ensue was discussed. Mr. O’Brien told me that one afternoon Miss Warrington’s uncle, a man by the name of Baumgarten, I believe, had come into his place of business and inquired of Monte Austin, in his presence, if he knew that Marsha Warrington was going with Mr. Diggs, and Mr. O’Brien told me that Mr. Austin replied that he did not know for a fact that Miss Warrington was going with Mr. Diggs; Miss Warrington’s uncle then continued and said that if Mr. Warrington found out for a fact that Miss

Warrington was going with any married man, that he would kill him, and that if he found them together he would kill both of them. I believed that statement. I had a conversation with the same gentleman, Mr. O'Brien, at the Columbia Hotel, on March 3rd, 1913, relative to threats made by Mr. Diggs Sr. I had two conversations with Mr. O'Brien on March 3rd relative to remarks made by Mr. Diggs Sr. The first one was at Mr. O'Brien's place of business, during my lunch hour, about 12:30. At that conversation, Mr. O'Brien and I were together, were alone, I should say, and afterwards we went over to the Columbia Hotel where Mr. Diggs was and went over the conversation again. He told me—he called me up at my office first and told me that he wanted to see me. So I went up there. He told me that Mr. Diggs had come into the saloon looking for Maury and me, and that he had some policeman with him; he came in and said: 'Do you know where Maury is?' to Mr. O'Brien; Mr. O'Brien replied 'No, sir'. He said, 'I think you are a damned liar'. Mr. O'Brien said he didn't know where he was. Thereupon Mr. Diggs got very angry and excited and acted like a maniac and pounded his bar with his fist. He said that there was a bunch of people in Sacramento who were ruining his son, mentioning two girls and me, and that he intended to put a stop to it if he had to have everybody arrested, that if any other person sold liquor to Mr. Diggs he would have them arrested. That he was not going to stand having his son ruined by people who were exerting an evil influence on him as he thought. I believed that statement when it was told to me by Mr. O'Brien. Mr. O'Brien told me that there was a policeman in front of his place of business, and for me to come in the back way. After that I went to the Columbia Hotel, and there had a conversation with Mr. O'Brien, in

the presence of Maury I. Diggs. When I refer to Mr. Diggs as having been the party at the saloon, I mentioned Mr. I. P. Diggs. I believe at the Columbia Hotel Mr. O'Brien repeated for Mr. Diggs' benefit—Mr. Maury I. Diggs—what he had told me at the saloon, and we simply added a few comments of ours to it as to the likelihood of whether his father would do it or not. On Monday, March 3, 1913, I had a conversation with Mr. I. P. Diggs, the father of Maury I. Diggs, over the telephone. I was in the office in the State Capitol at that time. In the office of the State Board of Control. The phone bell rang. We had a buzzer system in the office there; there were 5 or 6 extensions and my signal on the buzzer rang and I answered the phone. The gentleman on the other end said 'Hello, is this Mr. Caminetti?' Do you want it verbatim or in substance? I can give it almost verbatim. 'Is this Mr. Caminetti?', and I said it was. 'This is Mr. I. P. Diggs of Berkeley; do you know me?' 'No, sir'. 'Do you know Maury Diggs?' 'Yes, sir'. 'I am Maury Diggs' father; do you know me?' I said 'How do you do, Mr. Diggs'. He said 'I came up here to see Maury, can you tell me where he is?' I said 'No, sir'; he said 'Well, I have reason to believe that you can'. I said 'You are mistaken'; he said 'Well, I came up here from Berkeley to get him, and I am going to get you too, I find that you boys are running around with two girls here and have been acting in a way that married men should not, that you are no fit man to work on the Board of Control, and I am going to let them know it; you are carousing and running around the country and not staying at home and not attending to your business; you are not a fit man to work there, and I am going to take steps to see that they find out about it'. There were five or six extensions, as I say, and I didn't want the members of the

Board of Control to hear that, and I said, 'You had better see me personally and say that to my face'. He must have taken that as a threat, because he said, 'Yes, God damn you, I will tell it to your face, and I will tell it to others, too', and he hung up the telephone. During that conversation Mr. Ford and Mr. Avery were in the office. I believe it was about 11 o'clock in the morning. I remember seeing Mr. Lesley, the uncle of Mr. Maury I. Diggs, on Monday evening, March 3rd. I had a conversation with him at that time. It took place in Mr. O'Brien's establishment. Mr. Lesley told me that he had seen Mr. Diggs that afternoon, that he was around town acting like a wild man, that he had policemen with him, that he had telephoned all around the country, to all the surrounding towns, mentioning particularly, I remember, Placerville and Stockton, and had notified the police in those towns that if they got hold of Maury Diggs to arrest him and hold him. He also told me that Mr. Diggs had made up his mind to have the two girls and myself and Maury arrested, that he was going to put Maury and me on probation. The two girls that Mr. Lesley referred to were Miss Warrington and Miss Norris. I know Mrs. Maury I. Diggs. I remember Mrs. Diggs calling me up over the telephone on Wednesday, Mar. 5, 1913. I was in Mr. O'Brien's place, at a little after 5 o'clock. I was called to the phone and a voice which I recognized as belonging to Mrs. Diggs said, 'Mr. Caminetti, for a long time you have been a snake to me, now I am going to show you what a real serpent is; I know that you and Maury have been going around with two girls, Marsha Warrington and Lola Norris, and I know the name you have been going under—Mr. Whitman; I am going to tell these girls' parents and you know what will happen to you.' I had been trying to in-

terrupt her as soon as I got the drift of what she was saying, but I could not; at that point, however, I succeeded, and I tried to point out to her that she should not do anything like that, that if she took a hasty action like that at that time, that later on she might repent it. I could not succeed in getting her to see anything of that kind. I finally succeeded in getting her to promise me that she would take no step in the matter until after I had a chance to talk to her in the matter; she said if I came out soon enough she would not do anything until she would see me. So I made an engagement for 7:30 that evening, and I went out there. When I got in the house, after she let me in, she repeated the remarks that she had made to me over the phone and then went deeper into it. She told me of several trips that Mr. Diggs and Marsha and Lola—Miss Warrington and Lola Norris and I had taken. She told me the things she had suffered through the fact that we had been going with these girls. She depicted to me the suffering my wife probably went through because we went with these girls, and told me that she was going to tell these girls' parents—she repeated that again—as the only way in which to break this up; that if she did that that I knew what would happen to me, that that would put an end to it all, that Mr. Warrington would probably shoot. I tried to persuade her out of that, at least I tried to dissuade her from seeing the girls' parents, but I could not succeed in getting that promise from her. About 8 o'clock Mr. Maury Diggs and Mr. Lesley came in and that put an end to the conversation; upon their entrance I got up and left the house and went down town. At that time I believed she would carry into execution the threats that she made. I believed what she said to me. I knew that she had the facts, had found out the facts in the case. Mrs. Diggs had been

greatly worried. She acted that evening as if she was capable of going to any length at all; she was very nervous and very excited. She had not had any sleep, she told me, during that week. That was the week when Mr. Diggs was hiding from his father. She told me she had not had any sleep, she was half crazy, and she intended to make me and these two girls suffer everything that she had suffered. I remember having been at the Peerless Restaurant on Saturday afternoon, March 8, 1913. I saw Maury I. Diggs there at that time. There were different people there at different times. Miss Norris and Miss Warrington were not there all the time. They were there during part of the time. I had a conversation with Maury I. Diggs in the Peerless Restaurant with reference to something his father had said to him while in San Francisco. The Peerless Restaurant is in the City of Sacramento on 9th Street between 'K' and 'L'. Miss Warrington was there when I got there and later on, just after I got there, Miss Norris came in. Mr. Diggs said, 'I have just come up from San Francisco and my father is coming up Monday to have you and Lola and Marsha arrested; he claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.' He said, 'I tried to keep him from coming up, but I could not, and he will be up here tomorrow morning.' That is about the substance of what he said. He went over it and enlarged upon it. I replied, 'Then, I am gone.' I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go, and when he said that Miss Warrington said, 'I am going, too; I can't stay here if you leave.'

And Lola—Miss Norris—said that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen, but she could not leave. Thereupon Miss Warrington turned around and said, ‘Lola, I am going and you have got to go too.’ I believed the statements made by Mr. Diggs to me as having come from his father were true. I had already had a talk with him over the phone in which he said that same things, and by the tone of his voice I knew that he was extremely angry with me at that time, and from what Mr. Diggs said I gathered that his anger had grown. I told Miss Norris and Miss Warrington and Maury I. Diggs of the conversation I had had with Mr. Lesley, to which I have testified. Prior to the conversation at the Peerless Restaurant I told them about what Mr. Lesley had said.

Q. Did you ever read the White Slave Law?

A. No, sir.

Mr. SULLIVAN. Wait a minute. I object to that as immaterial.

The COURT. The objection is sustained. Let the answer be stricken out.

Mr. HOWE. We note an exception.

(There was no cross-examination of this witness.)” (Transcript of Record, pp. 402-407.)

The defendant was corroborated, in his testimony, by the evidence of Elizabeth Caminetti, his wife, Transcript of Record, pp. 395-398; by Lina Diggs, the wife of Maury I. Diggs, his companion, Transcript of Record, pp. 407-411; by I. P. Diggs, the father of Maury I. Diggs, Transcript of Record, pp. 394-395; by M. H. Diepenbrock, the owner of the Diepenbrock Building in Sacramento, where Maury I. Diggs had his offices as an architect, and to which

the defendant and Lola Norris repaired on several occasions, Transcript of Record, pp. 399-402; by P. J. O'Brien, a saloonkeeper in Sacramento, Transcript of Record, pp. 377-386; by Thomas J. Ford, a clerk in the State Board of Control, where the defendant was employed, Transcript of Record, pp. 374-377; by C. L. Avery, also employed as accountant in the State Board of Control, Transcript of Record, pp. 372-374; by D. T. Leitch, a chauffeur in Sacramento, Transcript of Record, pp. 365-372; by J. A. Putman, connected with a newspaper, the "Evening Bee", in Sacramento, Transcript of Record, pp. 363-364.

Finally, the evidence is uncontradicted that when the question first arose as to what they should do or how they should live after arriving in Reno, the defendant, Lola Norris, Maury I. Diggs and Marsha Warrington had passed the boundary line dividing the states of California and Nevada, and, in fact, had almost reached Reno. In other words, the evidence conclusively shows that if any intent and purpose was formed at all, it was first formed *long after* the furnishing of any transportation and first came into existence *after* they had crossed the boundary line dividing the states of California and Nevada and had almost reached Reno.

Argument.

I.

The Act of Congress of June 25, 1910 (36 Stat. 825), Designated as the "White-Slave Traffic Act", Is Unconstitutional.

(Transcript of Record, pp. 7, 45, 46, 47, 48, 30-33, 143; Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 10, 15, 17.)

This point is raised both on demurrer and motion in arrest of judgment. (Transcript of Record, pp. 7, 30-33.)

We presume, again, to advance this contention and to save the point, although we are aware that the Supreme Court of the United States has decided that the "White-slave traffic Act" is constitutional.

Hoke v. United States, 227 U. S. 308; 57 L. Ed. 523;

Athanasaw v. United States, 227 U. S. 326; 57 L. Ed. 528;

Bennett v. United States, 227 U. S. 333; 57 L. Ed. 531;

Harris v. United States, 227 U. S. 340; 57 L. Ed. 534.

We will not attempt, in view of the decisions of the Supreme Court of the United States, upholding the constitutionality of the "White-slave traffic Act", to do more than to state the points on which we rely in support of our contention that the

“White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

The “White-slave traffic Act” is claimed to derive its constitutional sanction from subdivision 3 of section 8 of article I of the constitution of the United States, which provides that Congress shall have power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

We contend that “persons” are not subjects of commerce.

New York v. Miln, 11 Peters, 102; 9 L. Ed. 648;

License Cases, 5 How., p. 599; 12 L. Ed. 256;

Bowman v. Chicago & N. W. R. Co., 125 U. S. 489; 31 L. Ed. 700.

Congress has no power or authority to punish prostitution within the states.

Congress has no authority to legislate or to make a criminal act anything which may be done in a sovereign state by any person.

U. S. v. Warner, 188 Fed. 682.

The only power Congress has over any person is while such person is “*in transitu*”.

Lemon v. The People, 26 Barb., (N. Y.) 270;
aff. in 20 N. Y. 562.

Congress has not prohibited prostitutes from traveling.

The Supreme Court of the United States has repeatedly declared that commerce among the several states shall be “free and untrammelled”.

Welton v. State of Missouri, 91 U. S. 275;
23 L. Ed. 347;

Hall v. DeCuir, 95 U. S. 485;

Webber v. Virginia, 103 U. S. 344;

Passenger Cases, 7 Howard 283; 12 L. Ed.
702;

King et al. v. American Transportation Co.,
14 Fed. Cases 512;

Boyse v. Anderson, 2 Pet. 150; 7 L. Ed. 379.

Without further elaborating on this contention, we respectfully submit that the “White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

II.

The Trial Court Erred in not Holding that the Facts Proved by the Prosecution, Assuming Them to be True, Did Not Constitute Such an Offense as was Intended by Congress to be Prosecuted by Virtue of the Act Known as the "White-Slave Traffic Act", nor Does the Prevention and Punishment of the Things Proven Fall Within the Scope of the Purpose for Which That Act Was Intended and Which the Defendant Is Charged with Having Violated, in That There Is No Evidence to Show That the Defendant Profited by, or Expected to, or Intended to, Profit, or Share in any Profit Ensuing or Arising in Pursuance of the Transportation Set Out in the First Count of the Indictment, Upon Which Defendant Was Convicted.

This question is raised by assignments of errors numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17; (see motion to instruct the jury to acquit; also motion in arrest of judgment; Transcript of Record, pp. 30-33; 45, 46, 47, 48, 412-414).

These assignments of errors distinctly raise the proposition that acts of immorality, such as is claimed by the prosecution to have been established in the case at bar, are not within the letter or spirit of the "White-slave traffic Act".

This is, confessedly, not a case of commercialized vice. The first count of the indictment, upon which the defendant was convicted, does not allege facts of commercialism in the transportation of Lola Norris, or that defendant intended to profit thereby. It

does not charge that he is a "white-slaver". It does not set forth any facts which place him in the category of a "white-slaver". Lola Norris is not alleged to have been the victim of a "white-slaver" or "white-slave plot". It is merely charged that the purpose of the defendant, in the transportation, was that the "said Lola Norris should be and become the concubine and mistress of the defendant". There was not the slightest pretense, during the taking of the voluminous testimony, that the purpose of the defendant savored in the slightest degree of commercialism or that his conduct, in connection with the transportation of Lola Norris (assuming that he did anything to aid or assist in her transportation, which we deny), was anything more than an escapade or elopement. At its worst, it was the foolish amour of an impetuous and love-crazed young man, 24 years of age, with an equally rash young woman, 20 years old. Lola Norris, on the witness stand, confessed her intense affection for the defendant. Both lived in Sacramento, California, when they first met and during the period when their acquaintance ripened into terms of intimacy and mutual affection. She knew that he was married and that he had a family consisting of his wife and two small children. She was introduced to the wife and mingled with her at several social gatherings and dances. In spite of this awkward and compromising situation, she kept company with the defendant for several months previous to their flight from Sacramento, California, to Reno, Ne-

vada, and was on such terms of intimacy that upon several occasions she went on automobile trips with him, they remaining away together from their respective homes over night, during which occasions they occupied apartments together ostensibly as husband and wife. She, however, testified that her very first act of sexual intercourse did not take place until after their arrival at Reno. All this is disclosed by the evidence in the record. The evidence also shows that her acquaintance with the defendant was not forced upon her; that she met him secretly and clandestinely; that she enjoyed his company willingly, and requited his attentions; that she deceived her parents and kept the fact from them that she was associating with the defendant, or that he was married; and that, finally, fearful of the scandal, notoriety and disgrace which her association with the defendant, a married man with two small children, might cause and which she believed to be impending and about to become public property through the medium of a local newspaper, the "Evening Bee", and also fearing her probable arrest under the State Juvenile Law, she voluntarily and willingly accompanied the defendant and Maury I. Diggs and Marsha Warrington on the trip from Sacramento to Reno. There is not the slightest pretense that in all her actions she did not act willingly and of her own free will and accord. There was evidence that she was directly influenced in leaving Sacramento by the advice and pleadings of Marsha Warrington, although she her-

self denied this on the stand. But aside from this, the verdict of the jury, acquitting the defendant of having persuaded, or induced, or enticed either Lola Norris or Marsha Warrington to leave Sacramento, is conclusive, and sets at rest any controversy or question that might be made upon that score.

The evidence shows that similar motives actuated and impelled the defendant, as they did Lola Norris, in leaving Sacramento. Fear of disgrace, exposure, scandal, notoriety; loss of his public position; the wrath of the father of his companion, Maury I. Diggs, who blamed the defendant largely for the escapades of his son and the neglect of his family, which, the defendant feared, might result in bodily harm to him from the hands of Diggs' father as well as Marsha Warrington's father; the animosity and threats of the wife of Maury I. Diggs, who also blamed the defendant for her husband's neglect and his associations with other women; the indignation and resentment of his own wife for his neglect of her, she threatening to complain to the juvenile authorities in Sacramento and to have the young women arrested; his own probable arrest by the juvenile authorities for contributing to the delinquency of Lola Norris, a minor, 20 years of age; all these, and other, matters coming fast and thick upon him induced him to leave Sacramento rather than face what he believed to be the imminent and impending danger of exposure, disgrace, scandal, notoriety, bodily harm and probable arrest.

We are, therefore, brought to the threshold of the second proposition advanced in this Opening Brief, and that is *that*, as the facts adduced by the prosecution do not make out a case of commercialized vice, or of "white-slavery", and there is not the slightest pretense that the defendant, by any act of transportation (assuming that he did anything of that kind, which we deny), profited financially, or expected to profit financially, or share in any profit ensuing, or arising, or expected to arise, from the transportation of Lola Norris, and because of any subsequent immoral act or conduct on her part, *there can be no violation of the "White-slave traffic Act"*. In other words, we contend that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice—of "white-slavery"—and not to "*des affaires-de-coeur*" or escapades such as the facts disclose in the case at bar.

In support of this contention, which we do not understand to have been directly raised in any previous case either in the Supreme Court or the Circuit Court of Appeals, it will be necessary to examine closely the provisions of the "White-slave traffic Act" and to refer, briefly as possible, to the history of its enactment and other matters with reference thereto.

The defendant respectfully contends that the "White-slave traffic Act," *as construed by the trial Court*, is unconstitutional; and he further contends

that the *facts disclosed at the trial could not in any event constitute a crime under the said Act.*

In stating these points for argument and elucidation, we are not unmindful of the rulings of the United States Supreme Court in the cases of Athanasaw v. U. S., 227 U. S. 326; Hoke v. U. S., 227 U. S. 308; Bennett v. U. S., 227 U. S. 333; Harris v. U. S., 227 U. S. 340; U. S. v. Bitty, 208 U. S. 393, nor the several other federal cases construing the Act and reported in the Federal Reporter.

The indulgence of this appellate tribunal is respectfully solicited, if we revert to elementary rules of construction and interpretation; but the gravity of the case compels us to present the argument in as clear a light as possible that no injustice may be done the accused.

The Courts will take judicial notice that the traffic in girls and women as prostitutes, or to be debauched, or for other immoral practices, for gain, is a species of illicit *commerce*. This *traffic* reached such alarming proportions and became such a menace to society generally that it became necessary for the governments of the world to take formal steps to suppress it. To that end, a conference of nations was called and held in Paris. As a result of that conference the different nations represented, upon July 25, 1902, entered into an "agreement or project of arrangement for the suppression of the white-slave traffic, * * * for submission to their respective governments." This agreement was made

public within the United States, by proclamation of the President, upon June 18th, 1908.

35 U. S. Stat. at Large, pt. 2, pages 1979-1984.

For the purpose of carrying out the terms of that international agreement, the "White-slave *traffic* Act" was passed. It was approved June 25th, 1910.

36 U. S. Stat. at Large, 825.

The Courts will further take judicial notice of the illicit *traffic* as condemned, exposed and generally commented upon in the daily press, magazine articles and books; also as depicted in theatrical plays and moving-picture shows generally immediately preceding and contemporaneous with the passage of the Act.

From these different sources and from general public and private discussions, the terms "*white-slave*", "*white-slaver*", and "*white-slave traffic*" have now each received a definite meaning in the English language, of which, again, the Courts will take judicial notice.

The Funk & Wagnalls New Standard Dictionary of the English language (New York & London, 1913) thus defines "white-slave":

(Title "slave") "a girl *sold into captivity*". "White slavery", under the title "slavery" is thus defined by that condition to which young and innocent girls are debased when *sold into captivity* for immoral purposes.

"Judge Thomas T. C. Crain in General Sessions, New York, May 26, 1910."

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, on page 1002, makes use of the term "*white-slaver*" in the following sentence:

"If a state when considering legislation for the suppression of prostitution within its own limits may properly take into view the evils that inhere in that degrading vice, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by allowing the *white slaver* to transport women and girls from one state to another for the purpose of prostitution and debauchery?"

We thus clearly perceive that there was loud and popular call all over the civilized world for legislation to root out the evil. The popular demand resulted in the enactment by Congress of the Act of June 25, 1910, the Act under which the defendant was convicted.

Sedgwick, on Statutory and Constitutional Law, says:

"On the other hand, there is no doubt that very eminent judges have, in the construction of statutes, been wont to permit their minds to be influenced, and in fact to take a sort of judicial cognizance of many intrinsic facts, in regard to which evidence certainly would not have been permitted, and which, indeed, could not perhaps be proved.

The English statute, 26 Geo. 11, c. 23, declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. The question was brought before the Kings Bench, whether the act was to be interpreted to include illegitimate children; and Lord Mansfield, in holding that it

did so, put his decision on the ground of the mischiefs which the act was intended to obviate; 'this act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very numerous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief.' "

Sedgwick on Statutory & Constitutional Law,
pages 241-242.

The true purpose and scope of the "White-slave traffic Act" is nowhere better stated than in the report of the Committee on Interstate and Foreign Commerce to Congress in favor of the adoption of the bill then pending, which subsequently became the "White-slave traffic Act". This report was made through Representative Mann, the author of the "White-slave traffic Act". We set out just such portions of that report as are apposite to this particular phase of our argument:

("THE WHITE SLAVE TRADE.")

"A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a *villainous interstate and international traffic in women and girls*. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in

general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*

The evil, as a present day existing evil of widespread dimensions which has arisen, has been given careful attention by the representatives of most of the civilized nations of the world, and has been made the subject of an international agreement. Thousands of public-spirited citizens have combined in various national and state organizations for the purpose of lending their aid in its suppression. The *white-slave trade* has been so prevalent that prosecuting officers, both state and federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an *evil* which many state legislatures have attempted to regulate within the past two or three years by means of the enactment of state statutes. Inasmuch, however, as the *traffic* involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations, the *evil* is one which cannot be met comprehensively and effectively otherwise than by the enactment of federal laws.

Investigations conducted by government agents disclose the fact that a national and international *traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes.* This *traffic* has come to be known the world over as '*the white-slave trade*'. It is referred to by the Paris conference as '*the trade in white women*'.

There are few who really understand the true significance of the term '*White-slave trade*'. Most of those who have given only a casual thought to the subject have the im-

pression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way to earn a living. In many cases such is not the fact. The results of careful investigation into this subject discloses the fact that the inmates of many houses of ill fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the *business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution.* These investigations have disclosed the further fact that these women are *practically slaves* in the true sense of the word; that many of them are kept in houses of ill-fame *against their will*; and that *force, if necessary, is used to deprive them of their liberty.*

The characteristic which distinguishes "*the 'white-slave trade'*" from *immorality in general* is that the women who are the *victims* of the *traffic* are *unwillingly forced to practice prostitution.* The term "*white slave*" includes *only* those women and girls who are *literally slaves*—those women who are *owned and held as property and chattels*—whose lives are lives of *involuntary servitude*; those who practice prostitution as a result of the activities of the *procurer*, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their *owners.* In short, the *white-slave trade* may be said to be the *business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.* Its *victims* are those women and girls who, if given a fair chance, would, in all human probability,

have been good wives and mothers and useful citizens.

The preamble of an existing international agreement on this subject states that the several governments, 'being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women* ("traite des blanches"), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose'. It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against this *criminal traffic* by providing for the punishment of those engaged in that *traffic* and by regulations established by the act.

Extensive investigation by government commissions and prosecuting officers in various parts of the country disclose the fact that in many cases involving women and girls imported into this country, and those transported from one state to another, the *procurers resort to all of the means and devices known to the criminal classes to accomplish their purposes. Liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power.* In some cases those who have been induced to come to the large cities are first introduced to the house of prostitution under the influence of liquor; in others, the *procurer* enters into a pretended marriage with his victim; in many cases involving the importation of women and girls from abroad and their transportation from one state to another the inducement is the promise of legitimate employment with handsome compensation. *Hundreds of men in large cities live from the earnings of the victims of the white-*

slave trade, and in many instances the more extensive of *international procurers live in affluence*. The books kept by a notorious *importer* of French girls, who was arrested in Chicago a few months ago, disclosed his earnings for the year previous to his arrest, largely from his *importation and wholly from his exploitation of girls*, to have been more than \$102,000.

The investigations into this subject conclusively shows the fact that for some time after they are first unwillingly forced to take up a life of prostitution many of the victims would at once abandon it were it possible for them to do so. The facts are that in order to insure her continuance in the degraded life, to which she has been unwillingly forced to submit, the procurer has resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, a *prisoner*. Obviously the portions of the act which require the *proprietor of a house of ill-fame* to report to the federal authorities concerning the arrival in the establishment of an alien woman or girl would, at least so far as concerns aliens, make *unlawful detention* practically impossible.

The national and international importance of suppressing this *criminal traffic* is clearly shown by reference to the treaty, the preamble of which is given above, and reports of governmental officers and others on the subject.

The Secretary of Commerce and Labor, in his annual report for 1908, page 18, refers to the matter in the following terms:

‘It is highly necessary that this *diabolical traffic*, which has attained international proportions, should be dealt with in a manner adequate to compass its suppression. No punishment is too severe to inflict upon the *procurers* in this *vile traffic*.’

The act of February 20, 1907 (sec. 29), created an immigration commission, the membership of which was to consist of three Senators, three members of the House of Representatives, and three persons to be appointed by the President of the United States. In a preliminary report submitted February 27, 1909 (Doc. 1489), the commission says:

‘The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that many women are being regularly imported under conditions which often amount to *absolute slavery*.

* * * * *

‘It is believed that as a result of this investigation the commission will be able to make recommendations which will put a very decided check upon this *horrible traffic*, if, indeed, it will not practically break it up entirely.’

THE TRAFFIC IS SYSTEMATIC AND EXTENSIVE.

Governmental investigations which have been conducted disclose the fact that the importation of women and girls from foreign countries has been systematic and continuous, and has not been limited to isolated and accidental cases. The facts in connection with investigations conducted by the district attorney at Chicago may be taken as typical of the situation in many other cities.

At the time of the arrest of several notorious French importers in Chicago a large amount of correspondence and other documentary evidence fell into the hands of the authorities. This evidence showed beyond a reasonable doubt that there was in existence an *organized system*, or *syndicate*, having for its purpose the importation of women from foreign countries to Chicago, and other cities in the United

States for immoral purposes. This syndicate had headquarters and distributing centers in New York, Chicago, Omaha, Denver, San Francisco, Los Angeles, Seattle and Nome, Alaska.

It is conservatively estimated, from an examination of the data and information at hand, that the *syndicate* has imported annually during the preceding 8 or 10 years on an average of about 2000 women—largely French. It also appears that the *syndicate* regularly sent agents to Europe to *procure girls, at stated prices, to be brought to the United States, where they were placed at the disposal of the keepers of houses of prostitution.* The usual methods employed in evading the immigration officers at the port of entry was to pass the women as the wives or sisters of the procurers with whom they arrived.

One of the chief members of this syndicate was the Frenchman Alphonse Dufaur, who was the defendant in six indictments, in the Chicago District, charging him with harboring alien women in violation of the existing law. Dufaur and his wife subsequently forfeited bonds in the sum of \$25,000 and became fugitives from justice.

Another active importer and procurer was Henry Lair, who operates establishments in Chicago and San Francisco. One of Lair's agents was a man named Louis Paint, who some time ago was convicted of importing in New York and who is now serving a sentence of four years in the penitentiary at Atlanta, Ga., for importing women for Lair. On the recent trial of Lair, in Chicago, Paint testified that he had been given \$800 by Lair and told to go to Paris for the purpose of procuring two girls for Lair's establishment in Chicago. Lair was convicted and sentenced by

Judge Landis to serve two years at hard labor in the penitentiary at Fort Leavenworth and to pay a fine of \$2500.

Various arrests have been made in the Chicago district which disclose the existence of a *traffic in girls* from Hungary, Sweden, Norway, Denmark, Great Britain, and other countries.

In this connection it is of interest to note the *profits realized by those engaged in the importation of alien women for the purpose of prostitution*. For this purpose the information in the possession of the government, as the result of prosecution against the French procurer, Dufaur, which is definite and accurate, may be taken as typical of the *remunerative character of the traffic*. The books of account kept by Dufaur show that *his income*, from his *establishment in Chicago*, realized largely as a result of his success as an *importer*, was, for the 12 months immediately preceding his arrest, upward of \$102,000. These books also show that during the month of May, previous to his arrest, the *earnings of one girl, a recent importation*, were \$723. In almost every instance which has come to the attention of the authorities the girls who were imported from France by the *French syndicate* were compelled to turn over every day to the *proprietor of the establishment in which they were detained all their earnings*. They were usually allowed only enough to purchase the clothing necessary to make them attractive to frequenters of the place.

INTERNATIONAL AGREEMENT FOR THE REPRESSION OF THE TRADE IN WHITE WOMEN.

A project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respec-

tive governments by the delegates of various powers represented at the Paris conference for the repression of the *trade in white women*.

The stipulations of this project of arrangement were confirmed by preliminary agreement signed at Paris, May 18, 1904, by the governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council.

By its resolution of March 1, 1905, the Senate of the United States advised and consented to the adhesion by the United States to the said project of arrangement, and therefore, on June 6, 1908, the President announced the adherence on the part of this government to the project, and this adherence was on June 15, 1908, covered by the proclamation of the President. This treaty was published in pamphlet form by the State Department as Treaty Series, No. 496, and a complete copy is attached hereto as appendix B. The preamble of this agreement recites that the various governments, being desirous to assure to women who have attained their majority, and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women—'traite des blanches'*—have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose." (Italics ours.) (See Congressional Record, Vol. 50, pp. 3368, 3370-3371.)

Where the language of a statute is ambiguous or doubtful, it is well settled that resort may be had to the history of the Act.

"Both the *debates*, however, and the *reports of committees* may be consulted for the pur-

pose of ascertaining the *general object of the legislation proposed* and the *evils* sought to be remedied.” (Italics ours.)

36 Cyc., pp. 1138 and 1139, and cases there cited;

Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226.

Even the *title* of the *Act* may be referred to as tending to throw light upon the legislative intent of its *scope or operation*.

Said Mr. Justice Brewer in Holy Trinity Church v. U. S., *supra*:

“We find, therefore, that the *title of the Act*, the *evil which was intended to be remedied*, the *circumstances surrounding the appeal to Congress*, the *reports of the Committee of each House*, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.” (Italics ours.)

To the same effect, see

Binns v. U. S., 194 U. S. 486; 48 L. Ed. 1087;

Coosaw Mining Co. v. So. Car., 144 U. S. 563; 36 L. Ed. 542.

In ascertaining the intent of a statute, especially the remarks of the member in charge of the bill, are important and of value.

Cyc. Vol. 36, pp. 1138, 1139;

U. S. v. Wilson, 58 Fed. 768;

Ex p. Farley, 40 Fed. 66.

Let us look at the Act.

Section 6 recites the Paris Agreement, the President's proclamation by which it was published to the people of the United States, and the designation of the Commissioner-General as the official in charge of the foreign branch of the traffic, and clearly relates to prostitution or debauchery as a business or commerce, and not to voluntary sexual intercourse free from any feature of profit or remuneration.

Section 8 classifies the whole Act under one subject and entitles it the "*White-slave traffic Act.*"

Sections 2, 3 and 4 define what acts shall be deemed crimes under the Act and provide penalties for their respective violations.

Sections 1 and 7 define words used in the Act; and section 5 prescribes the venue for trials.

The Act was passed by Congress under the grant of power contained in art. 1, sec. 8, subd. 3, of the constitution,—known popularly as the "interstate commerce clause".

From what we have said, it will be apparent, without citation or argument, that the *traffic* in female human beings—the procuring, selling or using for financial profit—comes directly, and not by implication, within the meaning of the word "*commerce*" as used in the constitution.

However, the trial Court, we respectfully submit, conceived a wrong impression of the nature and scope of the Act and erroneously instructed the jury to the injury of the defendant. The only definition of "interstate commerce" given the jury by the Court will be found on pages 427, 428, of the Transcript of Record, where the Court said:

"The term interstate commerce, so far as here involved, means transportation or carrying from one state to another, and such transportation may be by means of a railroad or any other mode of carriage usually employed by common carriers of passengers."

And the Court's whole charge to the jury is based upon that erroneous definition of the term "interstate commerce" as used in the Act.

It is upon this that we predicate an assignment of error among several others on the same general subject.

A perusal of the Act will readily disclose where the Court obtained its erroneous conception.

The title of the Act is misleading. At first reading, one would readily conclude that the subject was "An Act to prohibit the *transportation* for immoral purposes of women and girls". Again, the first section would lead one to the same conclusion, wherein it says:

"That the term 'interstate commerce' *shall include* transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia."

The subject of the Act, however, as expressed in the title, is: "An Act to further regulate interstate and foreign *commerce*"; and the first section merely recites that the term "interstate" shall include any state, territory and the District of Columbia. In other words, the Act is for the purpose of further regulating interstate and foreign *commerce*, and *not* an Act to regulate the *transportation* of women and girls for immoral purposes, as erroneously conceived by the trial Court.

Let us now elucidate by applying a few rules of construction and interpretation.

"Laws are expounded and enforced, not made, by the Courts. The makers are entitled to have their real meaning, if it can be ascertained, carried out. Hence the *primary object* of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended. Hence, also if the Courts can ascertain the legislative meaning, their duty is to give it effect, whatever may be the personal opinions of the incumbents of the bench on the policy of the law."

Bishop on Statutory Crimes, 3d Ed. Sec. 70.

"It is indispensable to a correct understanding of a statute to enquire first what is the subject of it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be

modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * In the Eureka case, Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to *what the legislature intended, and when that is ascertained it controls.*' * * *"

Vol. II Lewis' Sutherland Statutory Construction, 2d Ed. Sec. 347.

"In *United States v. Winn*, 3 Sumn. 209, 211, Fed. Case No. 16,740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.' To the same effect are *United States v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *American Fur. Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2d ed. 282; Maxwell, Interpretation of Statutes, 2d ed. 318."

U. S. v. Bitty, 208 U. S. 393, 403, 52 L. ed. 543.

Reverting to the case at bar:

What was the *intent* of the legislature in enacting "The White-slave traffic Act"? From what sources do we, or can we ascertain, such intent?

(1) The congressional intent is expressed in the title:

“An Act to further regulate interstate and foreign *commerce* * * *.”

(2) The congressional intent is expressed in section 6 of the Act:

“and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the *suppression of the white-slave traffic*, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris Conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, * * *.”

(3) The congressional intent is expressed in section 7 of the Act, wherein it is provided that a corporation, company, society or association may be guilty of a violation of the provisions of the Act, and this rule of construction is prescribed:

“The word ‘person’, as used in this Act, shall be construed to import both the plural and the singular as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission or failure of any officer, agent or other person acting for or employed by any other person or by any corporation, company, society or association, within the scope of his employment

or office, shall in every case be also deemed to be the act, omission or failure of such other person, or of such company, corporation, society or association, as well as that of the person himself."

(4) The congressional intent is expressed in section 8 of the Act, wherein it defines and entitles the Act as the

"White-slave traffic Act."

"White-slave, a girl *sold into captivity for immoral purposes.*"

Standard Dictionary, *supra*;

Holy Trinity Church v. U. S., 143 U. S. 457,
36 L. Ed. 226.

(5) The congressional intent is expressed in the caption of the President's Proclamation, referred to in section 6 of the Act (35 Stat. at Large, pt. 2, p. 1979):

"Agreement between the United States and other Powers for the *repression of the trade in white women*. Signed at Paris, May 18, 1904; ratification advised by Senate, March 1, 1905; adhered to by the President, June 6, 1908; proclaimed June 15, 1908."

(6) Also in the first paragraph of the Proclamation:

"Whereas a project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respective governments by the delegates of various Powers represented at the Paris Conference for the *repression of the trade in white women.*"

(7) Also in the preamble of the International Agreement, referred to and made a part of the President's Proclamation (35 St. at Lg. pt. 2, pp. 1980-1984):

"His Majesty the German Emperor, * * *, being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as to minor women and girls, an efficacious protection against the *criminal traffic* known under the name of *trade in white women* ('*traite des blanches*') have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose * * *."

(8) Also in article 6 of the Agreement which recites:

"The contracting governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaux or agencies which occupy themselves with finding places for women or girls in foreign countries."

(9) Further, in the action of the Senate upon the Agreement (Vol. 39 Cong. Rec., pt. 4, p. 3770):

"Repression of the *trade in white women*."

"The injunction of secrecy was removed March 1, 1905, from projects of a convention and an additional arrangement adopted on July 25, 1902, by the delegates of the various Powers represented at the Paris conference for the repression of the *trade in white women* ('*traite des blanches*')."

In these several documents it will be seen that the terms "*trade in white women*" and "*white-slave traffic*" are used interchangeably, and the words "*trade*" and "*traffic*" as being synonymous.

A few definitions may aid in bearing out our contention. They are quoted from *The Century Dictionary* (N. Y. 1913):

“Slave”—“A person who is the chattel or property of another and is wholly subject to his will; a bond-servant; a serf.”

“Slave-trade”—“The trade or business of procuring human beings by capture or purchase, transporting them to some distant country, and selling them as slaves; traffic in slaves.”

“Trade”—“8. The exchange of commodities for other commodities or for money; the business of buying or selling; dealing by way of sale or exchange; commerce; traffic.”

“Traffic”—“1. An interchange of goods, merchandise, or other property of any kind between countries, communities or individuals; trade; commerce.”

(10) The congressional intent is disclosed by the history of the Act, the debates in Congress and the reports of committees.

Holy Trinity Church v. U. S., 143 U. S. 457;
36 L. Ed. 226.

(11) The congressional intent is shown by the contemporaneous construction given the Act by the executive departments of the Government.

U. S. v. Ala. R. R. Co., 142 U. S. 621; 35
L. Ed. 1135;

U. S. v. Finnell, 185 U. S. 236, 244; 46 L.
Ed. 890;

New York v. New York City R. R. Co., 193
N. W. 543, 86 N. E. 565.

It is hardly necessary, however, to go outside the Act to ascertain the intention of Congress to suppress the white-slave traffic,—the abominable practice of enticing, coercing, buying and otherwise procuring girls to be enslaved in prostitution, debauchery and other immoral practices for the profit and gain of their masters—white-slavers. It is not necessary to refer to the newspaper, magazine or platform demand for legislative action prior to and contemporaneous with the passage of the Act.

Could any other intent be deduced? If there can, let counsel for the United States point it out.

Having thus ascertained the

“true intent of the legislature”, to use Mr. Justice Story’s language, *supra*, “we must adopt that sense of the words which harmonize best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.”

Applying this rule to sections 2, 3 and 4 of the Act, it will be seen, at a glance, that they *solely* refer to any “*person*”. But, by section 7 of the Act, the word “person” is made to include a “corporation, company, society, or association”, engaged in the interstate traffic in *white-slaves* or women to be used for immoral practices. It will not be seriously claimed that a “corporation, company, society, or association” is capable of sexual intercourse. Yet the use of the words “corporation, company, society, or association”, shows that Congress had in

mind the fact that a "corporation, company, society, or association" might engage, equally with a person, in the illicit *trade, traffic or commerce* of bartering in girls and women for immoral purposes for profit or gain.

We deem this conclusive.

A more appropriate title for the Act would, perhaps, have been, "An Act to further regulate interstate and foreign commerce by prohibiting therein the trade or traffic in white women to be used as slaves in commercialized vice."

None of the evidence or testimony in the case at bar attempts to prove the defendant a "white-slaver". There is not a scintilla of evidence of any, the slightest, commercialism in the case at bar. The whole theory of the prosecution, from its inception, was based upon the erroneous conception that the Act covered all cases of immoral interstate conduct. The prosecuting attorneys, as well as the Court, labored under this grossly erroneous interpretation of the Act. The erroneous conception, as we have before stated, consisted of the idea that it was an Act to regulate *transportation*—that the jurisdiction of the Court rested upon the right to regulate interstate *transportation*, instead of the right to regulate interstate *commerce*.

This leads us to the construction to be placed upon the word "commerce" as used in the federal constitution.

We respectfully contend that the word “commerce”, as employed by the framers of the constitution, implies a means to a financial, pecuniary or other like remunerative end,—traffic or trade for emolument or compensation. That this meaning is basic or fundamental. That we unconsciously imply such meaning whenever we employ the word.

Bearing this fundamental definition in mind, let us apply some elementary rules of construction and examine some of the leading cases which have construed this word in the constitution.

“48. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed *as to give effect to the intention of the people who adopted it.*

Where the meaning shown on the face of the words is definite and intelligible, the Courts are not at liberty to look for another meaning, even though it would seem more probable or natural, but they must assume that the constitution means just what it says.

3. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law and the legislation previously existing in the state.”

Black’s Constitutional Law, 2d Ed., Secs. 48-49.

“The Court should put itself in the position of the legislature,—stand, in contemplating the statute, where the maker of it stood—the better to discern the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning, thus perceived, must be given

them by the Court. Thus, 'Time,—if the statute is old, or if it is modern, the Court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require.' "

Bishop on Stat. Crimes, 3d Ed., Sec. 75.

"In a book not strictly of the legal class we read: 'No sentence or form of words can have more than one "true sense", and this only one we have to enquire for. This is the very basis of all interpretation. * * * Every man or body of persons, making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning, and amounts to absurdity.' "

Same, Sec. 94.

"Adopted from other state or country. * * * In the adjudications on this question, no nice distinctions have been drawn; but, in a general way, it is held that a word, phrase or statutory provision, adopted from the laws of another state, or from England, * * * will ordinarily receive the construction it had in the law whence it was taken.

Constitution.—In pursuance of the presumed intent of the makers, a constitutional provision, adopted from another state after it had been judicially interpreted, will, in the absence of any contrary indication, retain the meaning thus previously ascertained."

Same, Sec. 97.

"Looking to the subject for the meaning, if a statute employs a word which, though not

legal is technical to its subject, we give it the technical sense,—not the general sense, not one technical to another subject—unless something appears indicating a different intent of the legislature. Thus,—

An Act relating to commerce is interpreted by the vocabulary of merchants, not of mechanics.”

Same, Sec. 99.

“Ordinarily the language is to be understood in its common signification, as for instance, general terms are to receive their general, not restricted sense.”

Same, Sec. 102.

“Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted.”

Same, Sec. 92.

“Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influence that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it, and inconveniences can be borne long enough to await that process. But if the legislature or the Courts undertake to cure defects

by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Oakley v. Aspinwall (N. Y.), 3 Coms., 547, 568.

Having these fundamental principles in mind, we will proceed to apply them to the word "commerce" as used in the constitution.

Our first step will be to place ourselves in the constitutional convention—revert to Philadelphia, Pennsylvania, as of September 17th, 1787,—the date of the adoption.

The next step will be to ascertain what that convention understood by the word "commerce" when the delegates caused it to be inserted into subdivision 3, section 8, of article 1 of our federal constitution.

As we have seen, resort may be had to prior laws—to the English common law—the law adopted by this country and so adopted at about that time. Therefore, the highest authority we could find to enlighten us upon the subject would be the definition given it by Blackstone himself. Sir William Blackstone completed his Commentaries in 1765, just twenty-two years prior to the drafting of our

constitution. No one will argue that any different meaning crept into the law during this interim. Blackstone's definition of both foreign and domestic commerce will be found on pages (original paging) 273 to 278, subdivision V. In part, it is as follows:

"V. Another light in which the laws of England consider the King with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a foreign trade, its privileges, regulations, and restrictions, and would be also quite beside the purpose of these commentaries, which are confined to the laws of England; whereas, no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of *traffic* and merchandise; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called *the law merchant* or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the law of England, which decides *the causes of merchants* by the general rules which obtain in all commercial countries; and that often, even in matters relating to *domestic trade*, as for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange.

With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

First, the establishment of *public marts*, or places of *buying and selling*, such as *markets*

and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these *public resorts* to such time and such place as may be most convenient for the neighborhood, forms a *part of economics*, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent *value*. * * *"

Thirdly, as money is the *medium of commerce*, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority to make it current. Money is an universal medium, or common standard, by comparison with which the *value of all merchandise* may be ascertained; or it is a sign which represents the respective values of all commodities."

Chancellor Kent's Commentaries (N. Y., Nov. 23d, 1826) on the subject of commerce is also instructive.

Commentaries on American Law, Vol. 1, pp. 32-34; 431-439.

Not only in these works, but in all definitions of the word found in the text books and reported cases, the fundamental conception of the word "commerce" will be found to include a transaction for a monetary or pecuniary gain. Of course, the word is broad and includes within its meaning any an-

cillary subject, such, for instance, as the federal government jurisdiction over navigable waters wholly within a state. (Act of Sept. 19th, 1890.)

In other words, as we gather from Mr. Blackstone's definition, the first principle of the word in its, perhaps we might say, barbaric sense, is trade or barter. To this, the English law had included the subject of weights and measures and the coinage of money. Still other auxiliary subjects have also been construed as being included within the meaning of the word, but a close study of them all will disclose that the earliest conception of the word is still retained,—commercial intercourse for gain.

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, has cited a number of cases which construe this section of the constitution.

The first subject commented upon is that the power to regulate commerce includes the power to regulate the transportation of passengers. The jurisdiction of Congress to exercise this power in interstate travel, we do not question. We have no desire to quarrel with the United States Supreme Court regarding any of its decisions on this subject. We agree implicitly with that Court upon this subject. The common carrier of passengers is undeniably engaged in a commercial pursuit, the traffic for gain. The contract for carrying—evidenced by a ticket—is a commercial transaction and should be regulated by the state. The common car-

rier is engaged in a purely commercial enterprise and his business should be regulated. The passenger, as long as his contract of carriage is executory, is, to a more or less extent, subject to observe certain rules, regulations and laws which Congress directly, or through its agents, may impose. To this extent, therefore, Congress, under this constitutional power, regulates the passenger as well as the carrier. But this regulation of the passenger has its beginning and its end in the contract of carriage—the contract for gain—entered into by the common carrier engaged in a commercial enterprise. For instance: Should Congress pass a law, in furtherance of the public safety, forbidding passengers to stand upon the platform of a car while the train was in motion and prescribing a penalty to be imposed upon the passenger for its violation, it would be a constitutional law in interstate travel. Likewise, a federal interstate law forbidding expectorating on the floor or platform of an interstate train would be another instance.

But, outside the scope of the contract of carriage, the jurisdiction does not exist. For instance: Congress could not enact a law making it a federal offense for a person to purchase a ticket in one state, and, riding on a common carrier into another state, with malice aforethought for the express purpose of committing the crime of murder in such other state. In such case, the regulation would be the regulation of a criminal, not the regulation of a

passenger. The subject of the law would be the prevention of and punishment for a criminal offense. The fact that the defendant was an interstate passenger would be a mere incident. The intent of Congress, as expressed in such an Act, would be to prevent and punish for crime. In no sense, could it be construed as an Act to regulate interstate commerce. It would be an attempt to usurp a purely police power, which, under our laws, is vested exclusively in the several states. The same rule would apply were the wrong merely one of immorality. Suppose the Act one where Congress attempted to make it a federal offense for a man to travel from one state into another to have sexual intercourse with a prostitute or to debauch a woman, or attend an extremely immoral exhibition. What would be the subject of such an Act? What would be the "legislative intent" as expressed in the Act? Purely an attempt on the part of Congress to suppress or regulate immoral acts and the contract of passage on the common carrier merely an incident in no manner connected with the wrong sought to be prohibited. No barter, trade or traffic for gain would be involved in the commission of the offense itself—no act of a commercial nature would enter into the wrong doing. Congress would, in such a case, be attempting to regulate morals—not interstate travel. Again, would it make it any more of a commercial transaction should the woman to be debauched go in company with the accused? The

offense would be the same and the subject of the Act identical. As said by Mr. Justice Brewer in *Keller v. U. S.*, 213 U. S. 138; 53 L. Ed. 737; 29 Sup. Ct. Rep. 470; 16 A. & E. Ann. Case 1066, at page 149, a case decidedly in point here:

“While the Acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.”

That Congress has police power is not to be denied; but, as Mr. Black says:

“It is true that Congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations.”

Black’s Cons. Law, 3d Ed. 391-2.

The same author further says (p. 435):

“Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and ‘all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrounded or restrained and consequently in relation to these, the authority of a state is complete, unqualified and exclusive.’ ”

“A deliberate purpose to place the state police power under federal control can hardly be attributed to the framers of the constitution.”

Freund Police Power, Sec. 65.

See also:

Bishop on Stat. Crimes, 3d Ed. Sec. 990;
Tiedeman's Lim. of Police Power, Sec. 201.

The subject of the Act construed in the Rahrer case was intoxicating liquors—a commercial subject (140 U. S. 545, 35 L. Ed. 572).

The subject of the Addyston Pipe case was iron pipe—another commercial subject (175 U. S. 211, 44 L. Ed. 136).

The subject of the Popper case was the traffic in instruments intended to prevent conception—the selling of a commercial article in interstate trade (179 U. S. 305, 45 L. Ed. 203).

The subject of the Act construed in the lottery cases is expressed in its title: “An Act for the suppression of lottery traffic * * *” A trading in lottery tickets for gain—a pernicious commercial transaction (188 U. S. 321, 47 L. Ed. 492).

And so on with the others mentioned. The anti-trust Act; the Act prohibiting the interstate trading in misbranded or mislabeled dairy products; the pure food law; the Act prohibiting interstate traffic in gold and silver branded “United States Assay”. These are all laws regulating commercial

transactions—traffic or trade for gain—or articles of commerce—merchandise.

And so do we agree with Judge Russell, where he says, on page 1004 of the Hoke case:

“I might go ahead and mention numbers of instances where the regulatory power of Congress as contained in the constitution has been invoked for prohibiting the transportation from place to place of certain articles, and the Courts have well settled the proposition that the power of Congress to regulate the transportation of persons differs in no particular or degree from its power to regulate the transportation of property and things.”

Provided, that such persons are transported in the sense of articles of commerce—subjects of remuneration to those dealing or trading in or with them—as the objects of financial or pecuniary profit to the one transporting them. In this connection we do not mean the *common carrier*, but the *white-slaver*.

Otherwise, were the Act intended to “regulate the transportation of persons”, then the common carrier corporation, through its agents, would be guilty of a violation of the Act should any such agent sell an interstate ticket to a woman whom such agent knew intended to engage in prostitution, debauchery or other immoral practice—which construction would be absurd.

This latter would be the *regulation of the passenger traffic*; while the former would be the *regulation of the white-slave traffic*.

It may be contended that as one meaning of the word "commerce" is "sexual intercourse", that is sufficient to confer upon Congress jurisdiction to regulate such intercourse among the citizens of different states.

As we have seen, a word can have but one "true meaning"—and that controls.

The word "commerce" also means "a game of cards, played in various ways". But we do not expect counsel to insist that this would confer jurisdiction on Congress to regulate interstate poker, whist or five-hundred.

We do not think it necessary to argue that neither of these meanings, nor any other meaning than the one we have given, was intended by the framers of our constitution.

Taking all the testimony and evidence submitted in the case at bar to the jury as true, all the acts, commissions and omissions of the defendant combined would merely show an act of immorality, in so far as the United States is concerned.

That the white-slave traffic is pernicious and should be stamped out, we thoroughly agree. But that the Act covers mere interstate sexual intercourse immorality, we most emphatically deny. In this connection, we believe that we have conclusively shown that the view taken by the trial Court, of the object and scope of the Act, is unconstitutional. That the Act covers the subject *only* which it itself

expressly says it covers—the *TRAFFIC or COMMERCIAL DEALING in women and girls as prostitutes or for debauchery, or any other immoral "practices"*. That, had Congress intended that the Act should cover all interstate immoral acts, as the trial Court ruled throughout the trial and instructed the jury it did, in such a case the Act would be unconstitutional, such immoral conduct not amounting to an act of *commerce* within the meaning of the constitution. The object of Congress was to regulate interstate *commerce* in the traffic in girls and women, not to regulate mere interstate *immorality*.

Keller v. U. S., *supra*;

Ex parte Gouyet, 175 Fed. 230.

All the cases, in which the Act has been construed, have been cases within the object and scope of the statute, as we have construed it. That being so, none of them is in point here. As we have before said, we have no quarrel with any of the Courts which have heretofore held this law constitutional as applied to the facts disclosed in the reported cases.

Take, for example the case of Hoke et al. v. United States, 227 U. S. 308, 57 L. Ed. 523. It clearly appears in that case, that Effie Hoke kept a house of prostitution and that the trial Court "permitted the women to testify as to the acts of Effie Hoke at her house at Beaumont, restraining the liberty of the women in coercing their stay with her". It also appeared that the women trans-

ported were prostitutes. As stated by the Supreme Court:

“There was sufficient evidence, as the trial Court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes.”

Furthermore, the indictment in the Hoke case charged that the transportation was “for the purpose of prostitution”, whereas, in the case at bar, there is no such allegation or pretense. It is simply charged that Lola Norris was transported for an immoral purpose, to wit, “that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant”.

Next, take the case of *Bennett v. United States*, 227 U. S. p. 333, 57 L. Ed. 531. It appears that that also, was a case involving the transportation of women for a commercial and immoral purpose, to wit, prostitution.

The same is true of the case of *Harris v. United States*, 227 U. S. p. 340; 57 L. Ed. 534. That, also, was a case of commercialized vice.

Next, considering the case of *Athanasaw et al. v. United States*, 227 U. S. p. 326; 57 L. Ed. 528, it also affirmatively appears that that was a case of commercialized vice. The facts, as stated by the Supreme Court of the United States, show that the girl, in that case, was 17 years old and was transported ostensibly to become a chorus girl at the Imperial Theatre, Tampa, Florida. The theatre was

operated by the defendants, and their agent or booking representative at Atlanta had engaged her and furnished her transportation. She arrived at Tampa and met the defendant Athanasaw.

“As to what then took place, the girl testified as follows:

‘He showed me to my room and took the check to get my trunk. I went to sleep and slept until 2 o’clock in the afternoon. At that hour one of the girls woke me up to rehearse. I went down in the theatre, and stayed there about an hour, rehearsing, singing, and then went to lunch in the dining room. All of the girls were there and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn’t eat. After lunch I went to my room, and about 6 o’clock Louis Athanasaw, one of the defendants, came and said to me I would like it alright; that I was good looking and would make a hit, and not to let any of the boys fool me, and not to be any of the boys’ girl; to be his. *He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them.* His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down to the boxes. I went into the box about 9 o’clock. About that time Louis Athanasaw’s son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing and drinking. I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that: and Arthur Schlemann, one of the boys, said he would take me out. The others insisted on my

staying, and *said I would like it when I got broke in*. I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying, 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me.' "

That, undoubtedly, was a case of commercialized vice or a "white-slave case", within the letter and spirit of the "White-slave traffic Act". The girl in that case was transported for "the purpose of debauchery", as the indictment there alleged. There was present the element of commercialism. She was to "*get all of the money I (she) could get out of them*", a clear case of commercialized vice. The prosecuting witness further stated that she was told that she "*would like it when she got broke in*", clearly showing that it was intended that she should become a prostitute.

How different are the facts in the case at bar. We have but to quote from the testimony of Lola Norris, the prosecuting witness, on her cross-examination, to appreciate this radical difference. Miss Norris testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse

with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

Next, take the case of *U. S. v. Bitty*, 208 U. S. 393; 52 L. Ed. 543, and it will be found to be clearly distinguishable from the case at bar. The defendant, in that case, was convicted under an Act of Congress passed in the exercise of its jurisdiction with reference to *foreign immigration*. That jurisdiction is not founded upon the *commerce* clause of the constitution, but "upon the inherent and inalienable right of every sovereign and independent nation to regulate immigration in furtherance of its safety, independence and welfare."

Cons. Art. 1, Sec. 9.

See note to

Keller v. U. S., 16 A. & E. Ann. Cas. 1069.

Even Mr. Mann, the author of the "White-slave traffic Act", differentiates the case of *U. S. v. Bitty* and concedes that the facts disclosed in that case do not come within the purview of the "White-slave traffic Act". The Report of the Committee on Interstate and Foreign Commerce, submitted by Mr. Mann, sets out:

"SUPREME COURT DECISION CONSTRUING SECTION 3 OF THE ACT OF FEBRUARY 20, 1907.

Section 3 of the Act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported 'for other immoral purposes', and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.

This decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing." (Congressional Record, Vol. 50, p. 3369.)

Furthermore, the congressional history of the Act, as disclosed by the report of the House Committee on Interstate and Foreign Commerce, through Mr. Mann, the author of the "White-slave traffic Act", clearly discloses that the purpose and scope of the "White-slave traffic Act" was to affect cases of *commercialized vice only* and not mere voluntary sexual intercourse unaccompanied with any mercenary object or gain. The report declares, among other things:

"POLICE POWERS OF THE STATES NOT
INTERFERED WITH.

It is not the purpose of the bill to interfere with or usurp in any way the police powers of the states. The bill reported does not endeavor to regulate, prohibit or punish prostitution or the keeping of cases where prostitution is indulged in. The prohibition of prostitution and other immoral practices, and the punishment of the practice of prostitution or the keeping of

houses of ill fame, or other immoral places, in the several states, are matters wholly within the powers of the states and the federal government has no jurisdiction over those subjects. On the other hand it has been shown in the investigation relating to the 'White-slave traffic' that persons engaged in that business in some of the large cities felt quite free to engage in the traffic as between the states, when they hesitated about engaging in the traffic wholly confined to one state.

PROVISIONS OF THE BILL.

Most of the provisions of the bill are based upon the power of Congress over interstate and foreign commerce."

* * * *

"The sections above proposed have been so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution. The use of interstate commerce in sending prostitutes from one state to another in connection with this traffic in women would seem to be as directly connected with interstate commerce as the sending of tickets from one state to another in furtherance of the operation of a lottery. It is true the act of prostitution is not committed in connection with the interstate transportation nor was the drawing in connection with the lottery a part of interstate commerce."

* * * *

"THE WHITE-SLAVE TRADE.

A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not

needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*" (Congressional Record, Vol. 50, pp. 3368, 3370.) (Italics ours).

In addition to all of the reasons advanced by us, in support of the contention we make that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice, we insert an official expression of the views of the Department of Justice of the United States, which has been called to our attention, as follows:

"DEPARTMENT OF JUSTICE

Office of United States Attorney
District of Minnesota.

St. Paul, July 17, 1912.

The Attorney General,
Washington, D. C.

Sir: I have the honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the 'White Slave Traffic Act'.

One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufus Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night followed at a house of assignation in the

city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated this visit under like circumstances.

June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above named Act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in this office, and by him written out.

A copy of this statement is enclosed.

Careful consideration of the facts and circumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann Act. *The element of traffic is entirely absent from this transaction.* It is not a case of prostitution or debauchery and the general words 'or other immoral practice', should be qualified by the particular preceding words and be read in the light of the rule of *ejusdem generis*. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain.

Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has enlisted certain club women in her behalf who are insisting on the arrest being made.

As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

Very respectfully yours,
 (Signed) Chas. C. Houpt,
 United States Attorney."

“DEPARTMENT OF JUSTICE.

Washington, D. C.

July 23, 1912.

United States Attorney,
St. Paul, Minn.

I have received your letter of the 17th instant concerning a statement of the facts with reference to the complaint of one Ada Cox, against one Rufus Edwards of an alleged violation of the White Slave Traffic Act.

I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you.

Respectfully,

(Signed) GEO. W. WICKERSHAM,
Attorney General.”

In addition to this expression of opinion, we respectfully refer to similar views in other instances expressed by the Hon. Attorney General and to be found in Congressional Record, Vol. 50, pp. 3354 et seq., especially page 3366.

It is a settled rule of statutory construction that where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the lawmaking power a purpose to produce or permit such result, the contemporaneous construction given by an executive department of the government is of value in endeavoring to ascertain the legislative intent.

Said the Supreme Court of the United States, in the case of U. S. v. Ala. R. R. Co., 142 U. S. 615, 616, 621; 35 L. Ed. 1134 and 1136;

“We think the contemporaneous construction thus given by the executive department of the Government * * * a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case,—should be considered as decisive in this suit.”

Said the Supreme Court of the United States in the case of U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed. 890, 893:

“Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. * * * But if there simply be doubt as to the soundness of that construction * * * the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons.”

In the case of New York v. New York City R. Co., 193 N. Y. 543; 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or *by public officers whose duty it was to enforce it*, is entitled to *great influence*, but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject.

See also, statement of the rule and cases collated in Vol. 36 Cyc., pp. 1139-1142.

Another error committed by the trial Court in interpreting the "White-slave traffic Act", was in giving to the words, "debauchery, or for any other immoral *purpose*", a much broader meaning that was the intent of Congress in enacting that law. The trial Judge construed these words as comprehending *any* act of sexual intercourse, even though it was voluntary and absolutely free from any element of commercialism or mercenary gain or profit.

We admit that whatever of doubt or ambiguity there is in the "White-slave traffic Act" arises from the words "debauchery *or for any other immoral purpose*". If given the broad and comprehensive meaning accorded to them by the trial Judge in the case at bar, we respectfully contend that they subvert the intent and purpose of the "White-slave traffic Act" and give the Act a much broader scope and operation than was intended by Congress. If given the less broad interpretation, for which we contend, these words are then given their proper meaning, one which accords with the intent and purpose of Congress in passing the law.

We have seen, from other rules or canons of construction and interpretation, that it was, clearly, the intent of Congress that the highly penal provisions of the "White-slave traffic Act" should apply *only* to cases of *commercialized vice*. This view is further confirmed by taking into consideration the use of the words, "debauchery, or for any other *immoral purpose*". We submit that the trial

Judge was not justified in treating those words as applicable to *any* act of voluntary sexual intercourse absolutely free from any element of commercialism or mercenary gain or profit, such as is disclosed by the facts in the case at bar. The "White-slave traffic Act" makes use of the words, "prostitution or debauchery, or for any other immoral *purpose*", and again in the same section, "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral *practice*". It will be observed that the words "purpose" and "practice" are used interchangeably in the several sections, evidently having in mind various other and baser forms of immorality practiced for commercial gain by women and girls. A perusal of the "White-slave traffic Act" discloses that, in section 2, the words "purpose" and "practice" are used alternately and twice in that section. In section 3, they are used once alternately. In section 4, the word "practice" seems to be substituted for the word "purpose" in the expression "any other immoral purpose". In section 6, neither of the expressions "any other immoral purpose" or "any other immoral practice" seem to be used in the first paragraph of this section. A reference is simply made to "the transportation in foreign commerce of alien women and girls for purposes of *prostitution* and *debauchery*". In the second paragraph of section 6, however, will be found the expression, twice repeated, "any other immoral purpose".

Obviously, the word "practice", used generally throughout the Act interchangeably with the word "purpose", imports something more than a single act of sexual intercourse without a commercial design or purpose. "Practice", as defined by the lexicographers, signifies, *inter alia*, some act or function that we exercise or pursue as an occupation; as, to practice law. (Cent. Dic., Vol. 6, p. 4665.) The word should, therefore, be given this expressive meaning in order to correspond with the evils sought to be eliminated by the passing of the law, and, thus construed, *the vindicatory* part of the law has application only to those who attempt to exercise or follow acts of immorality as a vocation.

"Prostitution", of course, refers to commercialized vice. The words following it, "debauchery, or for any other immoral *practice (purpose)*", under the rule of construction known as "*ejusdem generis*", where general words follow the enumeration of particular classes of persons or things, will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Cyc., Vol. 36, pp. 1119, 1122, and case there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

State v. Erwin, 91 N. C. 545;

Lane v. State, 39 Ohio St. 312;

Ex p. Muckenfuss, 52 Tex. Cr. 467; 107 S. W. 1131;

State v. Goodrich, 84 Wis. 359; 54 N. W. 577;

Reg. v. Reid, 30 Ont. 732.

Under this rule of construction, the words “or debauchery, or for any other immoral *purpose*”, and again the words “or to give herself up to debauchery, or to engage in any other immoral *practice*”, undoubtedly should be construed as applicable only to “prostitution”, or, in other words, as applicable *only* to *commercialized vice*. The obtaining, furnishing, or bartering in young girls for the purposes of “*debauchery*”, by which we understand that expression to mean the pollution or ruining of young girls, is a species of traffic in young girls and women just as much as the obtaining, furnishing or bartering of more seasoned girls and women for the purposes of prostitution. The further expressions “other immoral *purpose*” and “other immoral *practices*”, are undoubtedly used in the same connection and refer to immoral practices too revolting to discuss, to which young girls and women may be subjected or which they may “practice” for profit or gain.

Likewise, “in accordance with the maxim ‘*noctitur a sociis*’, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears”.

See statement of this rule of construction in Vol. 36 of Cyc., pp. 1118, 1119, and cases there collated.

It is a well known fact that there is a radical difference of opinion between federal Judges, ex-

pressed in the trial of cases brought under the "White-slave traffic Act" as to the proper scope and operation of that Act. Some federal Judges, as did the trial Judge in the case at bar, have held that any act of sexual immorality, even though free from any element of commercialism or profit or gain to the person furnishing the transportation, is within the intent and purpose of the Act; while others have held, in accord with the construction we maintain, that the scope and operation of the Act is limited to cases of commercialized vice only. Among the latter Judges, we beg to refer to District Judge Pollock, of Kansas, whose charge to the jury in a case brought under the "White-slave traffic Act" we incorporate in this Opening Brief, as a part of our argument. This charge is as follows:*

*"In the
District Court of The
United States
for the
District of Kansas
Second Division*

CHARGE TO JURY BY HON. JOHN C. POLLOCK IN
UNITED STATES VS. LEE BAKER
SEPTEMBER 23, 1913

Gentlemen of the jury, you have now listened with care to the trial of this case up to this point when it becomes my duty under the law to charge you as to the law which shall govern you in your deliberations on a verdict in this case. You understand, gentlemen of the jury, in courts of justice where cases are tried before

* Note: This charge was reported by S. A. Buckland, an attorney at law at Wichita, Kansas, and was printed in pamphlet form by that gentleman after its revision by Judge Pollock, and we have inserted the entire charge from a printed copy.

the court and a jury, the responsibility is evenly divided between the court and the jury. The duty of the court under our form of laws is to declare the law of the case, and it is the duty of the jury to take the law precisely as declared by the court, for, if there be any mistake made in a matter of law, it is the mistake of the court and the court is responsible for such mistake. On the other hand, it is the duty of the jury to determine the facts from the evidence, and if a mistake be made in that matter it is a mistake of the jury and not of the court. The jury must trust the court implicitly to correctly declare the law, and the court must trust the jury to correctly find the facts in a given case from the evidence which is offered and received on a trial of the case before the jury; and if the jury unite the true facts of the case to the law as declared by the court in the verdict returned—whenever that is done, justice in our courts is properly administered; whenever it is not done for any reason, then justice is not properly administered.

Now then gentlemen of the jury I shall endeavor to state to you what it is that we are trying in this case today. In this case Lee Baker was presented to the Grand Jury and the Grand Jury returned an indictment against him in two counts under what is commonly known as the Mann act or White Slave Law that was some time since passed by our Congress. I shall read that law to you in a moment that you may become familiar with its terms. You understand, gentlemen of the jury, in a general way, in framing this Government of ours, the States that were then in existence for themselves, and for all other States that should be created thereafter, framed what we call a Federal Constitution and that the Federal Constitution and the laws of

Congress which are enacted in pursuance of our Constitution are the supreme laws of this country. It is binding upon the States just as well as upon the individuals. In doing that, as I have said, the States that were then in existence, and each State that has come into existence since, has agreed the Constitution and the laws of Congress enacted in pursuance of that Constitution shall be the supreme law of this country. That is the reason that Congress takes control of certain matters which are regulated by Federal law. The States were absolutely incompetent to regulate commerce between the different States, so they committed that matter to Congress, and the Congress of the United States under the Federal Constitution declares all laws and rules which relate to commerce between the several States, among the several States and with foreign countries. Now what is known as the 'White Slave Law' was enacted by Congress under what is known as the commerce clause of the Constitution; that is, it relates entirely to commerce between the different States of this country. Now you know in a general way there are certain matters that the State alone has power to deal with and the Federal Government has no power to deal with. Our States regulate our laws as to marriage and divorce. Our States define in their statutes what is adultery, what is bigamy, what is fornication; all these are matters over which Congress has no control and no concern whatever. It is absolutely impossible in a government situated as is ours for the Federal Government to have anything to say as to how people shall be married, and who are properly married and divorced. It is just as impossible under our form of government for the United States to define the crime of adultery where committed within the borders of a State. It

is a matter of the State's concern. It is for the States to punish for that matter, but it is within the power of Congress to regulate and control interstate commerce, that is, commerce from one State to another.

There are two counts in this indictment based on two distinct offenses which are prescribed by the law, and I will read the law and refer to the indictment. (Reads section.) (2) Section 2 of the act on which is based the first count of this indictment reads as follows: (Reads Section 2.) As I have said to you, the first count of this indictment is based upon the section that I have read; that count reads as follows: * * * present Lee Baker on or about the 28th day of June, 1912, in said District and within the jurisdiction of said Court at the City of Peabody, then and there being did unlawfully, knowingly and feloniously transport or cause to be transported from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri, one Cora Slover, then and there being a woman under the age of eighteen years for the purpose of prostitution or other immoral practices, the exact nature and character of said prostitution or other immoral practices being to the Grand Jury unknown, he the said Baker furnishing railroad transportation over the Chicago, Rock Island & Pacific Railway from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri.

Now, gentlemen, this act has not only been held constitutional by the Supreme Court of our country, but the Congress had the undoubted power to enact it for the purpose of regulating and keeping clean commerce between the States under the commerce clause of our national Constitution. The object and purpose of Congress in the passage of this act was to break up the practice of those engaged

in procuring women or girls in one State of our country and transporting or assisting in transporting them into another State to then become inmates of a house of prostitution, or to prostitute their persons in promiscuous sexual intercourse; in other words, to become or engage in the business of a prostitute; again, to prevent any one from transporting or assisting in transporting from one State into another State or Territory of our country any woman or girl under any guise, arrangement or device whatever for the purpose of there debauching or causing such woman or girl to be debauched by sexual intercourse, or other immoral practices which will cause her to live in a state of debauchery; or, to prevent any one from transporting, or assisting in transporting any woman or girl in such interstate commerce from one state to another for any such immoral purpose as will or may lead her into a life of prostitution or debauchery.

This is a criminal prosecution by indictment, hence, it devolves upon the government to make out the case charged in this indictment before you can convict, beyond a reasonable doubt. By that term, reasonable doubt, is meant exactly what it says; a reasonable doubt; such a doubt as will cause a thinking, prudent, reasonable man to hesitate before engaging in the graver or more important affairs of life. When any of the jury have in their minds an abiding conviction the defendant must be guilty as charged,—when they have reached that state of mind—they no longer have any reasonable doubt. The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to the city of St. Joe for the purpose of getting business in his occupation;

that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He travelled with her to St. Joseph and that they there lived together. *If what the defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this State he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.* Now it is the contention of the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, the intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law. *If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she should engage in prostitution, debauchery or immoral practices, then he is not guilty.* The burden of proving this charge beyond a reasonable doubt is on the Government.

There is another section of this statute which I shall read and under the evidence in this

case I find but little or any reason for submitting it. The third section reads: (Reading same.) That section of the statute is meant to cover cases when one entices another to travel in interstate commerce or does things inducing them for the purpose of having them engage themselves in prostitution or in such immoral practices or debauchery as will lead to sexual immorality and eventually to prostitution, but in this case, under the evidence, there is no evidence that he did induce her to go with him. *The evidence is that she was really the one who wanted to go with the defendant; so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. She says she wanted to go and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce. If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and you will so find; believing the contrary, the Government has failed to convince you that is true as charged in this indictment, then you will find him not guilty. Again, suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his inten-*

tions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the State authorities of Missouri, and not for the Federal Government, because, as I have said, what constitutes adultery, what constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the State. So what did this man intend? That is the question for your determination. Now, gentlemen, I have said, you are the exclusive judges of the credibility of the witnesses, the weight of the evidence and the facts as proved. Take this case and consider it as far as the law is concerned as I have charged you.

There is another section that doubles the punishment in case the girl furnished the transportation, as in section two, or, is induced to go, as under section three, is under eighteen years. The evidence is, I believe, that the girl at the time this transportation was furnished was under eighteen, but the punishment is left, if you find the defendant guilty, with the discretion of the court between certain extremes.

You will now retire to your jury room and consider the case. I have caused four forms of verdict to be prepared; one relating to each of the two counts of the indictment, one finding the defendant guilty on the first count of the indictment, if you so find; one finding him not guilty on that count, if you so find; also, two forms of verdict relating to the second count in the same manner, and I send the indictment and these four forms of verdict with you." (Italics ours.)

Finally, in urging upon this appellate tribunal the contention, made by us throughout the entire trial of the case in the Court below, that the "White-slave traffic Act", in its intent, scope and operation, was intended by Congress to apply to cases *only* of *commercialized vice*, we remind this Court that the "White-slave traffic Act" is a highly penal statute and that it should be strictly construed, and that, if there be any doubt and ambiguity in some of the verbiage of the Act, that doubt or ambiguity should be resolved against the government and in favor of the individual. As was well said in the case of *Hackfeld v. U. S.*, 197 U. S. 442, 450; 49 L. Ed. 826, 830:

"This is a highly penal statute, and we think the well known rule, as laid down by Mr. Chief Justice Marshall in the case of *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42, is applicable here:

'The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.' "

In concluding our argument on this phase of the case, we respectfully submit that the facts proven by the prosecution, assuming them to be true, do not bring the defendant within the scope and operation of the "White-slave traffic Act" and that a reversal must follow and the defendant discharged and permitted to go hence without day.

III.

The Trial Court Erred In Charging the Jury, and In Its Rulings Throughout the Trial and During the Arguments of the Prosecuting Attorneys, to the Effect that "If He (Defendant) Has Failed to Deny or Explain Acts of an Incriminating Nature, That the Evidence of the Prosecution Tends to Establish Against Him, Such Failure May Not Only Be Commented Upon but May Be Considered by the Jury With all the Other Circumstances in Reaching Their Conclusion as to His Guilt or Innocence". (Transcript of Record, p. 445.)*

* Note: The record shows that the following proceedings took place, when the giving of the above instruction was assigned as error:

"We likewise, if your Honor please, except to that portion of your Honor's charge wherein you state and advise and instruct the jury that the failure of the defendant while on the stand to explain certain matters contended by the Government to be of an incriminatory nature should be considered by the jury in weighing his testimony. We except especially to the following language of your Honor: 'and if he has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him such failure may not only be commented upon but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference'—

The Court. That latter part was not charged.

Mr. Woodworth. Your Honor did not give that?

The Court. No, that last clause was left out.

Mr. Woodworth. Very well, sir. We object to that portion of your Honor's charge." (Transcript of Record, p. 445.)

It should be explained that in the previous trial of the companion case of *United States v. Maury I. Diggs* (now also before this appellate tribunal for consideration, being case No. 2404, *Maury I. Diggs v. United States*), the same trial Judge gave the same instruction above set forth but added to it, after the word "innocence", the following: "Since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so." (See Transcript of Record in companion case of *Maury I. Diggs v. United States*, No. 2404, pp. 390-391.)

In the case at bar, the trial Judge, for reasons of his own and evidently fearing that he had gone much further in instructing the jury in the companion case of *Maury I. Diggs v. United States* than he had the right to do, eliminated from his subsequent charge in the case at bar the remarks: "Since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

We, however, respectfully submit that the instruction in the case at bar, even in its present emasculated and modified form, is equally erroneous and constitutes reversible error.

These instructions to the jury and the remarks and rulings of the trial Judge, taken in connection with the arguments of counsel for the prosecution, both during the opening and closing arguments, to all of which counsel for defendant vigorously and insistently objected and excepted, operated to the most serious prejudice of defendant, and constitute, we respectfully submit, unquestioned ground for reversal.

In order to appreciate the force of our objections to these instructions to the jury and their damaging effect to the substantial right of the defendant to a fair and impartial trial, it is necessary and proper also to consider, in connection with them, the rulings of the Court in permitting the prosecuting attorneys, both in their opening and closing arguments, to argue to the jury that, because the defendant had not explained or denied certain matters, while on the stand as a witness in his own behalf, this failure to explain or deny could be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence. In other words, if it was substantial error for the trial Judge to instruct the jury as he did, it was equally error on his part to permit the prosecuting attorneys to argue as they did. *E converso*, if it was erroneous for the trial Judge to permit the prosecuting attorneys to argue to the jury that, because the defendant had not explained or denied certain matters, while on the stand as a witness in his own behalf, this failure to explain or deny could

be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, it was equally serious and reversible error on his part to instruct the jury as he did. It is evident that a consideration of the law applicable to these instructions necessarily involves an examination of the propriety of the rulings of the trial Judge in permitting the prosecuting attorneys to argue, both in their opening and closing arguments, in keeping with the instruction of the trial Judge to the jury. Therefore, the assignments of error applicable to the instructions objected to and to the rulings of the Court and to the arguments of the prosecuting attorneys will all be considered together. These assignments of errors are Nos. 207, 206, 128, 129, 130, 131, 132, 133, 137, 142, 143, 144; Transcript of Record, pp. 445, 439, 440, 415, 416, 417, 418, 419, 421, 422, 423.

In order that this appellate tribunal may thoroughly understand the force of our assignments of error in this regard and may appreciate the pernicious effect of the rulings of the trial Court and of its charge to the jury, we take occasion to set out, in the Opening Brief, in the order of their sequence, first, the objectionable remarks of the prosecuting attorneys, both in their opening and closing arguments, to which exceptions were taken and assignments of error thereafter predicated, and then follow this up with the obnoxious portion of the charge to the jury by the trial Judge, to which

exceptions were duly taken and assignments of error are now urged.

The opening argument was made by Mr. Theodore Roche. At the very outset of his invective against the defendant, he said:

“MR. ROCHE. And we are at liberty to comment on the testimony given by the defendant because he has taken the stand, and for *his failure to deny certain testimony* given by the prosecution, *we can comment on that.*”

MR. WOODWORTH. We desire the record at this time, for the purpose of protecting the defendant’s rights, to show that we object to counsel *commenting on any failure on the part of the defendant to testify to anything in this case.*

THE COURT. *Proceed.*

MR. WOODWORTH. *We except.*” (Transcript of Record, p. 415; Assignment of Error No. 128.)

Again did Mr. Roche, in his opening argument, commit a similar error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant took that stand, Gentlemen of the jury, and by *his failure to deny really made admission that he—*

MR. WOODWORTH. We again except to the remarks of counsel.

THE COURT. Mr. Woodworth, I don’t understand your numerous exceptions. They certainly have a right to comment on the evidence.

MR. WOODWORTH. Our point is—and I will not make the objection again, let it be understood that the objection I now make runs to all of the argument of counsel, he comments on the failure of the defendant, after he has taken

the stand, to deny certain matters; in other words, counsel in the argument to the jury as to the defendant's failure to deny matters, he makes that comment, and we say that that should not prejudice him.

Mr. ROCHE. Counsel surely is not familiar with the decisions of the Supreme Court of the United States in making a statement of that kind.

The COURT. Of course, if the defendant fails to take the witness stand, then it is perfectly true that no inference unfavorable to him can be deduced therefrom; nor can it be unfavorably commented upon; indeed, it may not be commented on at all. But where a defendant takes the witness stand and gives testimony, then he brings himself within the category of any other witness in the case and his evidence—not only the evidence he gave but that which he *might have given* and *has not* may be commented on just exactly as you would comment on the evidence of any other witness.

Mr. WOODWORTH. Of course, we do not agree with your Honor. We do not think that is the law, and we except.” (Transcript of Record, pp. 415-416; Assignment of Error No. 129.)

Again did Mr. Roche, in his opening argument, commit the same error, with the sanction and approval of the trial Judge, as follows:

“Mr. ROCHE. They agreed before they left the confines of the State of California and before the train reached Reno, that they would take assumed names and would hire a bungalow at Reno.

Mr. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will find the testimony on pages 222-225 of the record. That was *after* they *crossed the State line*.

Mr. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the State line, and before the train passed from the confines of the State of California into the State of Nevada* these two men agreed to take fictitious names, and that these two men at that time made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live. Counsel in his statement virtually admitted that and he said that what happened at Reno was merely incidental and accidental.

Mr. WOODWORTH. I did not say that, Mr. Roche. I said they had determined to leave Sacramento and that what happened after they got to Reno was accidental and incidental.

The COURT. This jury is a jury of intelligent men. If counsel misstate the evidence to them in any way they will be able to determine that. I would not interrupt. Counsel is entitled to a legitimate limit within which to give his views of the evidence.

Mr. WOODWORTH. But he is not entitled to misquote counsel. I said what happened after they arrived at Reno was accidental and incidental.

The COURT. Counsel is characterizing it. I have never observed that these interruptions of this character, unless it is of a very flagrant kind accomplished anything except simply delay.

Mr. ROCHE. That fact has been established by the government, Gentlemen of the Jury, *although the defendant did not undertake to enlighten you on that matter himself.*

Mr. WOODWORTH. We except to that again." (Transcript of Record, pp. 416-417; Assignment of Error No. 130.)

Again did Mr. Roche, in his opening argument, commit the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant testified to a few threats made to him but the defendant has *not denied any of the facts connected with this transaction*, still he asks you to find him not guilty.

MR. WOODWORTH. Again we take an exception.

The COURT. Proceed.” (Transcript of Record, p. 417; Assignment of Error No. 131.)

Evidently, Mr. Roche overlooked, for the moment, the fact that the defendant had entered his plea of “not guilty”, and that this plea placed in issue the question of his guilt, and did not constitute any admission either in fact or law, but on the contrary, was deemed a complete denial of his guilt and a solemn protestation of his innocence. He also overlooked the fact that the defendant was entitled to the presumption of innocence throughout the trial of the case. He also overlooked the fact that the burden of proof was on the prosecution and that this burden never shifts in a criminal case.

Again did Mr. Roche, in his opening argument, persist in the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. I thought that Mr. Devlin might put the defendant F. Drew Caminetti on the stand for the purpose of showing that the statements on the train made in the presence of Warren Doan, were false, and that the testimony given here for the government was false, but not so, Gentlemen of the Jury.

Mr. WOODWORTH. Again we except." (Transcript of Record, p. 418; Assignment of Error No. 132.)

Again did Mr. Roche, in his opening argument, repeat and intensify the same error, with the sanction and approval of the trial Judge, as follows:

"Mr. ROCHE. I say that they did not dare—I use that word advisedly—that the defendant did not dare to take the stand and contradict the testimony of these girls.

Mr. WOODWORTH. Again we note an exception." (Transcript of Record, p. 418; Assignment of Error No. 133.)

Somewhat in keeping with the same line of argument, Mr. Roche said a little later on:

"Mr. ROCHE. It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case.

Mr. WOODWORTH. We object to any reference to the Diggs case.

The COURT. Yes, the evidence that was before the jury in the Diggs case is not here.

Mr. ROCHE. That is true, but the fact that some of these witnesses testified in the other trial has been made apparent by some of the witnesses here. I do not propose to refer to that testimony, however.

Mr. WOODWORTH. We take an exception." (Transcript of Record, p. 418; Assignment of Error No. 134.)

Again did Mr. Roche, just before the end of his opening argument, repeat insistently the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant did not testify, because the defendant in this case did not undertake to testify to anything that Lola Norris or Marsha Warrington testified to; I am only calling your attention to the conceded facts in this case *because the defendant did not on the stand deny any of the evidence relative to these persuasions and inducements.*

MR. WOODWORTH. We take an exception to counsel again referring to testimony which the defendant did not give.” (Transcript of Record, p. 419; Assignment of Error No. 137.)

The closing argument for the prosecution was made by Hon. Matt I. Sullivan. During the course of a bitter arraignment of the defendant, Mr. Sullivan followed insistently in the footsteps of Mr. Roche and, time and again, took the defendant to task for having failed to explain or deny this or that or some other matter which he, Mr. Sullivan, deemed of an incriminating nature. During all this tirade of scathing denunciation, Mr. Sullivan seemed to be oblivious of the fact that he himself had not asked a single question of the defendant on cross-examination. The prosecuting attorneys did not cross-examine the defendant at all, or ask him to explain or deny any of the matters which, in their arguments, they deemed of an incriminating nature.

“MR. SULLIVAN. *By his failure under oath upon the stand to deny any of the facts upon which the allegations of the first two counts are based he virtually admits them. Here are the admitted facts. He admits that he seduced Lola Norris; he admits that she was an innocent girl before he entered her house under a ficti-*

tious name and stole her from her mother and father; he admits that he was present in Diggs' office one night when Marsha Warrington was made drunk with champagne; he admits that that poor girl was there overcome and seduced by his partner in crime. These are his admissions by his failure to deny.

MR. WOODWORTH. We again except to that language." (Transcript of Record, p. 421; Assignment of Error No. 142.)

We call especial attention to the statement made by Mr. Sullivan, in which he refers to the "allegations of the *first two counts*", inasmuch as the defendant was convicted on the *first count*.

Again did Mr. Sullivan, with the sanction and approval of the trial Judge, commit the same error:

"MR. SULLIVAN. He *admits* that after repeated conferences between himself and Diggs. Lola Norris and Marsha Warrington it was finally agreed that the four should leave Sacramento. *That is admitted. It is admitted* that the defendant at the time of this agreement was a married man and had one child about 4 or 5 years of age and another child five weeks old. *It is admitted by the defendant by his failure to deny* that himself and Diggs agreed to pay the expenses of the trip.

MR. WOODWORTH. An exception, please.

MR. SULLIVAN. *It is admitted by the defendant by his failure to deny*, after proof by the government, that on the 10th day of March, of this year, the four of the party boarded the train of the Southern Pacific Company at Sacramento.

THE COURT. I would like to understand what counsel's exception refers to.

MR. WOODWORTH. The exception is this, that we consider it a well settled rule of law that a defendant when he takes the stand may be cross-examined, and that it is a violation of his constitutional privilege that he shall not be compelled to be a witness against himself, for counsel to refer to the fact that by his failure to deny certain things he deems them admitted. We have made that objection all along.

THE COURT. Yes, exactly, that is what I imagined counsel had reference to. The expression of counsel who is arguing the case that by his silence and failure to deny certain things he has admitted them is *but a form of comment upon his silence*. As a matter of law there is no question but what mere silence does not admit; but it is true under the law that while a defendant cannot be compelled to take the witness stand, that when he does so, *as I shall charge the jury*, he then subjects himself and his evidence to precisely the same character of comment and deduction *by his silence* as would prevail with any other witness. Now that is all that counsel is indulging in and I trust that unless there be some flagrant reason counsel will not constantly interrupt the argument because of course it simply leads to a consumption of time.

MR. WOODWORTH. I appreciate that.

THE COURT. *They are entirely within their rights to comment upon not only the character of the evidence that the defendant did give but that which he might have given, just as with any other witness. I cannot control them in that.*

MR. WOODWORTH. I appreciate you cannot control them; I appreciate that.

THE COURT. I take occasion now to repeat to the jury that it is not in law an admission of facts because one fails to deny them; that is, I mean so far as the evidence from the witness

stand is concerned. The rule which obtains with reference to pleadings does not apply to evidence, and therefore I suggest to counsel that if it accords with his ideas as to the form of his argument that you refrain from using the term '*it is admitted by the defendant.*'

Mr. WOODWORTH. That is very offensive, your Honor." (Transcript of Record, pp. 421-423; Assignment of Error No. 143.)

In spite of this admonition from the trial Judge, Mr. Sullivan persisted in indulging in the same kind of argument. It is true that he refrained from using the term "*It is admitted by the defendant*", but he made use of another expression, which amounted to practically the same thing. He used the expression "*It was proved by the government and not denied or attempted to be denied by the defendant*". Obviously, there was no difference between the two statements. One was tantamount to the other. Mr. Sullivan changed the *form* of his statement but not the *substance*. In doing this, he was not rebuked by the trial Judge but was permitted to continue his argument along the same line in spite of the renewed protests and exceptions taken by the attorneys for defendant to this course of argument and to the rulings of the Court thereon.

For instance, immediately following the admonition of the Court to "refrain from using the term '*it is admitted by the defendant*,'" and disregarding, without any rebuke or check from the trial Judge, this admonition, Mr. Sullivan said:

“MR. SULLIVAN. It was proved by the government and *not denied or attempted to be denied by the defendant*, that the four parties boarded the train on the 10th of March of this year; that Diggs paid the price of the tickets before boarding the train; that Diggs bought the Pullman tickets, and so forth. These facts were proved by the government and *not denied by the defendant because he took the stand in his own behalf and he had an opportunity of denying them*.

MR. WOODWORTH. We except.” (Transcript of Record, p. 423; Assignment of Error No. 144.)

It will not be seriously doubted, for a moment, that the argument of Mr. Roche, in his opening speech, and of Mr. Sullivan, in his closing address, approved and supported by the remarks and rulings of the trial Judge who permitted the comments referred to above, and who even went so far as to announce to counsel in the presence of the jury that at the proper time he would instruct the jury in consonance with the arguments of the prosecuting attorneys, were highly prejudicial to the substantial rights of the defendant, deprived him of a fair and impartial trial, robbed him of the presumption of innocence, placed an undue burden upon him, and, in effect, required him to prove his innocence, and misled the jury and placed him in a most unfavorable light before the jury.

This prejudice was incalculably accentuated by the trial Judge in his instructions to the jury. We take the liberty of setting out a considerable portion

of the Court's charge to the jury (also covered by Assignments of Error Nos. 206-207) immediately preceding that part which we deemed most highly objectionable, so that this appellate tribunal will fully understand and appreciate the force of the trial Judge's erroneous instructions on this subject and the deep and prejudicial effect against the defendant such charge must have had upon the minds of the jury.

This portion of the charge to the jury is as follows:

“As has been stated to you by defendant's counsel in their argument, one of the most material facts left in the case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken. Nor has he testified*

as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. *But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, to take this omission of the defendant into consideration.* A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, *and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*" (Transcript of Record, pp. 439-440; Assignment of Errors Nos. 206, 207.)

This charge to the jury, in connection with the arguments of the prosecuting attorneys above referred to and the rulings of the trial Judge permitting such arguments, and particularly the parts set out in italics, constitute very serious and re-

versible errors. The instruction itself does not state a correct rule of law, and the giving of it was a material and substantial error.

As stated in the leading case of *Balliet v. United States*, 129 Fed. Rep. 689, 695:

“We are satisfied that the instruction cast an *undue burden on the defendant*, and that it was also *misleading*. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that *the defendant was not prejudiced by the instruction*. The judgment below is accordingly *reversed*, and the case is remanded for a new trial.” (Italics ours.)

This is a decision by the Circuit Court of Appeals for the Eighth Circuit and the instruction in that case is substantially similar to the objectionable instructions given in the case at bar. It was as follows:

“It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case*, and which are *naturally within his knowledge*, you may consider that as a circumstance tending to show that the facts, if explained etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.” (Italics ours.)

The Circuit Court of Appeals for the Eighth Circuit said, of this instruction:

“We have not been able to conclude that this instruction states a correct rule of law, or that

the giving of it was not a material error. As we interpret this instruction, it means that inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issue in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government—that is, shown that he was guilty—and that his failure to explain was against him; that is, would justify a conclusion of guilt. This rule of law would put the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must perforce explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 (U. S. Comp. St. 1901, p. 660)) provides, in substance, that a person charged with an offense ‘shall at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.’ When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occu-

pies the attitude of any other witness, and may be cross-examined like an ordinary witness, and to the same extent. *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (*vide Rev. St. Mo.* 1899, Sec. 2637), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which obtains in the federal courts relative to the cross-examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Wills v. Russell*, 100 U. S. 625, 626, 25 L. Ed. 607; *Montgomery v. Aetna Life Ins. Co.*, 38 C. C. A. 553, 97 Fed. 913; *Goddard v. Creffield Mills*, 21 C. C. A. 530, 75 Fed. 818; *Safter v. United States*, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were 'material to the issues in the case', without direction on that

point, and equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance, or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.

The judgment below is accordingly reversed, and the case is remanded for a new trial."

In a concurring opinion, Circuit Judge Sanborn was even more forcible in his criticism of the instruction in that case and went further than the judges who delivered the majority opinion would go. The learned Judge said:

"I concur in the result, and in the opinion in this case, with this exception: The opinion contains the statement that it is the general rule

in the federal courts relative to the examination of all witnesses, except when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity, that the cross-examination must be limited to the matters testified to upon the direct examination of the witness. I concede the general rule, but I do not understand that it is discretionary with the federal courts to relax the rule, on the ground of convenience or necessity, so far as to permit a cross-examiner to cross-examine a witness, produced by his opponent, upon subjects not germane to those upon which he was examined in chief. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.* (C. C. A.), 129 Fed. 668; *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Montgomery v. Aetna Life Ins. Co.*, 97 Fed. 913, 916, 38 C. C. A. 553, 557; *Safter v. U. S.*, 87 Fed. 329, 330, 31 C. C. A. 1, 2; *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 107 Fed. 881, 884, 47 C. C. A. 34, 36; 1 *Greenleaf Ev. Sec.* 445; *Hopkinson v. Leeds*, 78 Pa. 396, *Fulton v. Bank*, 92 Pa. 112, 115. A rule which may be relaxed by the court when in its opinion it is necessary or is convenient to relax it is no rule at all. Such an exception is the abrogation of the rule because it leaves its controlling force and effect in every case to the discretion of the trial court. In my opinion the rule has not been so abrogated by the federal courts, and it ought not to be so destroyed. This rule rests upon a sound reason, which varies not, at the discretion of the court, by reason of convenience or necessity. It exists because a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines. *Wilson v. Wagar*, 26 Mich. 452, 458; *Campau v. Dewey*, 9 Mich. 381. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject con-

cerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not examine him. If he would examine the witness upon such subjects, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the federal courts the line of demarkation which limits a rightful cross-examination is clear and well defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own and take the chance of his testimony. For these reasons I adhere to the general rule upon this subject, but am unable to concede the correctness of the exception thereto stated in the opinion."

These able opinions of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet v. United States*, are most convincing and are directly applicable to the case at bar. While the phraseology

of the erroneous instruction in the case cited is somewhat different from those involved in the case at bar, still the instructions amount to substantially the same thing. In the case cited, the jury was instructed that “if he has *not fully explained*, or has *not explained matters which are material to the issue in this case*, and which are *naturally within his knowledge*, you may consider that as a *circumstance tending to show*” etc.; and, in the case at bar, the jury was instructed that “if he (defendant) has *failed to deny or explain acts of an incriminating nature*, that the *evidence of the prosecution tends to establish against him*, such failure may not only be *commented upon* but may be *considered* by the jury with all the *other circumstances in reaching their conclusion*, etc.”

Both of these instructions practically charged the jury that the failure of the accused to explain or deny was a circumstance indicative of guilt. Not only are such instructions *erroneous* but, as was pointed out in the case of *Balliet v. United States*, they are *misleading*. In the case cited, the instruction “left the jury at full liberty to determine what matters which had been given in evidence were ‘material to the issues in the case’, without directions on that point, and equal liberty to determine what matters were ‘naturally within his knowledge’ and susceptible of explanation”. In the instructions involved in the case at bar, the trial Judge made no attempt whatever to direct the jury as to what matters were “acts of an incriminating

nature that the evidence of the prosecution tends to establish against him". This left the jury at full liberty to determine what were "acts of an incriminating nature that the evidence of the prosecution tends to establish against him".

The testimony in the case at bar had taken a wide range and covered a considerable period of time. The trial covered practically two weeks, consuming eight actual court days. About thirty witnesses were examined on both sides. The transcript of the testimony, excluding arguments of counsel and the charge of the Court to the jury, amounted to 568 pages of typewritten matter. The trial Judge admitted a great deal of testimony for the purpose of throwing light upon the relations of the defendant with Lola Norris, and also upon the relations of Maury I. Diggs with Marsha Warrington, for a considerable time previous to their departure from Sacramento on the trip to Reno. The trial Court permitted the prosecution to exploit very fully the occurrences attending the trip from Sacramento to Reno as well as what transpired after the arrival at Reno and during their occupancy of the bungalow at Reno up to the time of their arrest by the California state authorities, and, even after their arrest, down to the time of their return to Sacramento. It is inconceivable that the jury could have intelligently selected from this mass of evidence all those "acts of an incriminating nature that the evidence of the prosecution tends to establish against him", and which, it was claimed, he, the

defendant, had failed to deny or explain, without some specific directions on the subject by the trial Judge, in connection with the giving of these particular instructions, of which the defendant now complains.

But, aside from the instruction being *misleading*, as above pointed out, it was radically *erroneous*. It was violative of the defendant's constitutional right not to be compelled to be a witness against himself; it was violative of the presumption of defendant's innocence; it was subversive of the doctrine of reasonable doubt, to which the defendant was entitled; it practically shifted and placed the burden of proof upon him; it placed an undue burden upon him; the jury was practically instructed that his failure to explain or deny matters, as to which it appears, however, he was not asked a single question either on direct or cross-examination, was a circumstance indicative of guilt. The vice of the instruction consisted in the fact that the trial Judge charged the jury that they might consider the failure of the defendant to deny or explain acts of an incriminating nature in determining his guilt, when it affirmatively appears that he was not asked to deny or explain any of the matters of an incriminating nature to which the attorneys for the prosecution alluded in their opening and closing arguments. *He was not cross-examined at all.* (Transcript of Record, p. 407.)

Article V of the amendments to the constitution of the United States expressly provides that:

“No person * * * shall be compelled in any criminal case to be a witness against himself.”

The Act of Congress of March 15, 1878 (20 Stat. at L. 30, chap. 37) provides:

“That in the trial of all indictments, information, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory including the District of Columbia, the person so charged shall at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

Boyd v. United States, 116 U. S. 616.

It is elementary and fundamental law of the land that a person accused of crime is presumed to be innocent.

Coffin v. United States, 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

The burden of proof is always upon the prosecution. This burden of proof *never shifts* in a criminal case. The issue is always single, and it relates, not to the defendant's *innocence*, but to his guilt.

Coffin v. United States, 156 U. S. 432;

McKnight v. United States, 115 Fed. Rep. 972;

Balliet v. United States, 129 Fed. Rep. 689;
 People v. McWhorter, 93 Mich. 641;
 Baker v. State, 80 Wis. 421.

The prosecution may adduce evidence sufficient to establish guilt, but the defendant is not called upon to aid them. When the prosecution rests, the case must be made out. If then a conviction is not justified, the failure of the defendant further to weaken the already weak case of the prosecution will not strengthen it. The requirement that his guilt shall be established beyond a reasonable doubt, and that he shall be presumed innocent until proven guilty, are safeguards which our law has wisely thrown about every person charged with crime, *but they were each of them denied to the defendant in this case by the erroneous instructions above set out.*

In the United States Courts and in the Courts of some of the states, independently of statute, and especially in California, the right of cross-examination is restricted to matters inquired of in chief.

12 Cyc., 577, 578;
 People v. McGungill, 41 Cal. 429;
 People v. Sanders, 114 Cal. 216;
 State v. Elmer, 115 Mo. 401; 22 S. W. 369;
 State v. Fairlamb, 121 Mo. 137;
 State v. Baldsoer, 88 Iowa 55;
 Balliet v. United States, 129 Fed. 689;
 United States v. Mullaney, 32 Fed. 370;

Sec. 13, Art. I, Const. of Cal.;

Sec. 1323, Cal. Penal Code.

In the case of *United States v. Mullaney*, just cited, Mr. Justice Brewer said:

“Of course, cross-examination is, in the Federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.”

Wherever this rule obtains, and this rule obtains in both the federal and state courts in California, it is held that the defendant *waives no right* and *surrenders no presumption* in going upon the stand, except as to *matters testified to in chief*. As to these, he may be fully cross-examined as any other witness may be. If he testifies falsely, or fails or refuses to answer proper questions put to him on cross-examination, he must bear the consequences. His manner upon the stand, his demeanor in answering questions, his hesitancy, his frankness, his failure to deny or explain matters as to which he is asked proper questions on cross-examination, these, and other matters going to his credibility, may undoubtedly be adverted to and commented upon by the attorneys for the prosecution as well as by his own counsel in their arguments to the jury. Where, however, he does *not go into a subject*, where he does *not testify at all as to a particular matter*, where he *leaves it as the prosecution left it*, where he is *not asked a single question on cross-examination*, the case

as made against him derives no support from *his silence*. The fact, therefore, that defendant went upon the stand in this case did not justify the instructions complained of.

The rule is thus summarized in Cyc., Vol. 12, pp. 577, 578:

“In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*”

See, also,

Cooley Const. Lim., (6th ed.) 384-386;

State v. Lurch, 12 Oregon 99;

State v. Graves, 95 Mo. 510;

People v. O'Brien, 66 Cal. 602;

Gale v. People, 26 Mich. 157;

Fitzpatrick v. U. S., 178 U. S. 304;

Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to comment or instruct where the prosecutor could not inquire, and the jury should not have been

directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The instruction then, finds no excuse in the fact that the defendant took the witness stand, and, in addition to the objections already urged, there is the grave objection that it practically shifted and placed the burden of proof upon him and called upon him to exculpate himself. Stripped of its excusatory qualification and its repetitions, it charges baldly: "If the defendant has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence;" in effect, instructing the jury that failure to explain or deny would bear out the contention of the government and indicate the guilt of the defendant.

Failure to explain can be against any one only when there is an obligation to explain. To found an adverse presumption upon such failure is to impose an obligation to explain. The party is forced to testify. Though silent, he speaks, and speaks in condemnation of himself. In this case the facts shown did not, as matter of law, prove the guilt. That remained a question of fact to be determined in view of the inherent, natural tendency of the facts upon the one side, and against

this was always to be considered, even though there was nothing more, the *presumption of defendant's innocence*. *This presumption was evidence in favor of the accused.*

Coffey v. U. S., 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

We deny that from defendant's silence on any particular matter or matters any presumption whatever was to be indulged against him. Had he not taken the stand at all, there would be no doubt as to this. But the Court assumed that, because he went upon the witness stand, he must fully deny or explain *every act of an incriminating nature, that the evidence of the prosecution tended to establish against him*, and if he did not, that this was to be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence. This was practically shifting the burden of proof on the defendant and was placing an undue burden on him and was deeply prejudicial to his substantial rights.

It is to be observed, from the record, that the prosecuting attorneys did not cross-examine the defendant at all. He answered every question put to him on his examination in chief and which the Court permitted him to answer. He was not silent as to anything he was asked and which his own counsel deemed to be material. They, presumably, examined him as far as they thought

necessary, and if, by inadvertence, or oversight, or misconception of what was material, they omitted anything, no presumption should be indulged against him.

But the defendant, having the right to remain silent altogether and there being no presumption against him because of his silence, what was the consequence of his testifying at all? Simply this—he put himself in the position of a witness and *exposed himself to PROPER cross-examination*.

The leading case of *Fitzpatrick v. U. S.*, 178 U. S. 304; 44 L. Ed. 1078, 1083, clearly lays down this rule and points out the line of demarcation between matters upon which it is proper to cross-examine a defendant and matters which it is not proper. It lays down the well-settled rule that the cross-examination of a defendant, like any other witness, is *limited to the matters inquired of on direct examination*, and that it is *only* in a case of a refusal by a defendant to answer a *proper question put upon cross-examination* that that is a *proper subject of comment to the jury*. The Supreme Court used the following language:

“Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a *right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness*, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from

his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a *cross-examination upon those facts*. The witness *having* sworn to an *alibi*, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a *proper question put upon cross-examination has been held to be a proper subject of comment to the jury* (State v. Ober, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. *If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Or. 300, 12 Pac. 441, is also authority for the proposition*

that he cannot be compelled to answer as to any facts not relevant to his direct examination."

We shall have occasion, farther on in this Opening Brief, to refer at length to both the authorities of *State v. Lurch*, 12 Or. 99; 6 Pac. 408, and *State v. Saunders*, 14 Or. 300; 12 Pac. 441, cited approvingly by the Supreme Court of the United States in the case, just referred to, of *Fitzpatrick v. United States*.

As has already been pointed out, in the United States Courts and in the Courts of the State of California the right of cross-examination is restricted to matters relevant to those inquired of in-chief and, wherever this latter rule obtains, it is held that the defendant waives no right and surrenders no presumption in going upon the stand, except as to matters testified to in chief. Especially should this be the rule where it appears, as it does in the case at bar, that the prosecuting attorneys did not see fit to cross-examine the defendant at all or ask him a single question. Yet, upon the arguments, they had the temerity to appeal to the jury to convict him because he failed to deny or explain this or that or some other matter which they, the prosecuting attorneys, deemed relevant and material and as to which they either did not wish, or had no right, to cross-examine him at all. They argued to the jury that defendant admitted his guilt by failing to deny or explain, and the trial Judge permitted them so to argue in face of the

fact that they had not attempted to ask him a single question on cross-examination.

The instructions, in practical effect, put upon defendant the burden of proving his innocence of the charge against him, and more than this, required him to vindicate himself against every imputation, however irrelevant, suggested by the testimony, whether by direction or indirection.

What is it that the defendant is called upon by these instructions to fully and truthfully deny or explain?

The instructions answer for themselves: "Acts of an incriminating nature, that the evidence of the prosecution tends to establish against him."

The instructions, in effect, assume that the evidence "tends to establish" acts of an incriminating nature. But it was for the jury to say whether there was any evidence or not tending to establish acts of an incriminating nature against him.

Furthermore, what were the "acts of an incriminating nature, that the evidence of the prosecution tended to establish against him"?

Here are qualifications or limitations without which the explanation called for would be wide as the realm of human knowledge.

Substantially everything in evidence, at least on the part of the prosecution, is assumed to relate to "acts of an incriminating nature". The instructions specify nothing within the record, as to what were the "acts of an incriminating nature

that the evidence of the prosecution tended to establish against him'', and it excluded nothing therein. Nothing contained in it, however incidentally brought in, but the jury may consider it, for the jury are not judges as to what constitutes materiality—that is for the Court—but the Court turned them adrift without chart or compass to guide them. They must accept everything in evidence as relevant and material to the issue.'

In *Leonard v. Washington*, 2 Wash. Terr. 381; 7 Pac. 872, the jury was instructed "that the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances that are proved, if the jury believe the defendant has the means of disproving them if they be false".

The Supreme Court of the Territory of Washington said, of this instruction given by the trial Court:

"This also is objected to as erroneous, and we deem the *objection sound*. It is assumed by this language that circumstances have been proved, whereas it is for the jury to say whether any have been proved or not. Moreover, by it the jury are charged that the defendant's *failure to disprove* will give additional weight to circumstances proved; whereas in truth the failure does not necessarily add weight to anything, but only brings into the case an additional circumstance of greater or less significance, namely, the failure itself; which circumstance is to be received by the jury for whatever on the whole it is worth, and may or may not combine with the other cir-

cumstances in the case, adding its weight to theirs, so that they with it will weigh more than they would alone.

As to any failure on the part of defendant himself to testify, we doubt whether the instruction is sufficiently qualified to the apprehension of the jury by another correct instruction, afterwards given, to the effect that the jury should draw no inference of guilt against the defendant from his failure to testify in his own behalf.

The code provides 'that it should be the duty of the Court to instruct the jury that no inference of guilt *shall arise* against the accused, if the accused shall *fail or refuse* to testify as a witness in his or her own behalf'. (Code of 1881, Sec. 1067.)

We think that the spirit of this provision demands that the failure of the defendant to testify *as to any point* shall not operate to his disadvantage *in any branch or aspect of the case.*" (Italics ours.)

In the same case, Turner, Associate Justice, in a separate opinion, said:

"I agree that that instruction is error, but I think it is error because it directs the jury *to consider the failure of the accused to offer evidence in his defense*, for the purpose of assisting them to remove a reasonable doubt of his guilt, when, under the law, he is in no case required to offer evidence until his guilt is established beyond a reasonable doubt. In other words, *I do not think the failure of an accused person to offer evidence can, in any case, be considered by the jury as a circumstance to determine, or to assist in determining, his guilt.*" (Italics ours.)

If it is error to permit a prosecuting attorney to examine a defendant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, it is certainly equally erroneous for the prosecuting attorney to comment upon matters which could not properly be elicited upon such cross-examination and, if that be so, it is equally highly improper for the trial Judge to instruct the jury that they may take into consideration, in reaching their conclusion as to the guilt or innocence of the defendant, the fact that he has failed to deny or explain acts of an incriminating character, as to which he could not properly be interrogated on cross-examination.

This proposition was lucidly stated by the Supreme Court of the State of Oregon in the case of *State v. Lurch*, 12 Oregon 99, 102. The Court there said:

“The Circuit Court, however, did commit error in permitting counsel for the State to examine the appellant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, and in requiring him to write his name and other names, as before suggested. The statute of the State, which allows the accused in such a case to be a witness, provides that when he offers his testimony as a witness in his own behalf, he shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified, tending to his conviction or acquittal. (Laws 1880, pp. 28, 29.) But this does not compel him to be a witness against himself beyond such cross-examination. The humane principle of the law, that a party shall

not be compelled to be a witness against himself, otherwise remains in full force, and is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he were to be called and made to testify at the instance of the State. The object and purpose of the statute referred to were to afford an opportunity to the accused to relate his account of the transaction in which he is alleged to be implicated, and it would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross-examination in such case must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained.”

The Court, in closing its opinion, used the following significant language, which we deem peculiarly applicable to the case at bar:

“Where the error consists of an infraction of a constitutional guaranty in favor of personal liberty, such as the *compelling a party accused of a crime to be a witness against himself*, the law will *presume an injury*, and the Court will have no alternative but to adjudge accordingly. The judgment appealed from will therefore be reversed, and the case remanded for new trial.”

This is one of the authorities referred to approvingly by the U. S. Supreme Court in the case of *Fitzpatrick v. United States*, *supra*.

The remarks of the Supreme Court of Michigan in the case of *Gale v. People*, 26 Mich. 156, 160, 161,

forcibly illustrate our contention. The Court there said:

“Few men, however innocent, could safely go upon the stand to answer a criminal charge, if they must, at their peril, be prepared to give satisfactory answers to questions regarding their whole former life, or, if they decline to do so, have their triers informed that the information they declined to give, it was proper for the prosecution to call out, and that the refusal to respond to the questions justly subjected them to unfavorable inferences.”

The case of *State v. Graves*, 95 Mo. 510, is directly applicable and it was held that it is error to allow the prosecuting attorney, over the objections of the defendant and without rebuke from the Court, to comment upon what the defendant might have testified about, but did not, when on the witness stand.

This decision applies directly to the conduct of the prosecuting attorneys in the case at bar in repeatedly urging upon the jury, without any rebuke from the trial Judge, but on the contrary on occasions with his approval, the fact that the defendant might have testified about certain matters, but did not, when on the witness stand.

During the course of an able opinion, the Supreme Court of Missouri said (at page 513 et seq.):

“The defendant offered himself as a witness and testified as follows: ‘I never received any bottle of medicine of Hub Wright; had nothing to do with it.’ This was the whole of his evidence. The prosecuting attorney in his closing

argument was permitted by the Court without rebuke (although objection was made) to comment on the fact that defendant, when on the stand, could have told where he was on the night of the larceny, but failed to make any statement as to where he was. We are asked to reverse the judgment on this ground, and this brings up the question as to whether or not the prosecuting attorney, in commenting upon the evidence given by a defendant in a criminal case who testifies in his own behalf, is confined to what he swore to on his examination, or whether he may, in addition to making comments on what he swore to, also comment on what he might have sworn to, but did not swear to.

By Revised Statutes, Section 1918, it is provided that a defendant criminally charged may testify in his own behalf and 'shall be liable to cross-examination as to any matter referred to in his examination in chief'. By Section 1919, it is provided that 'if the accused shall not avail himself or herself of his or her right to testify * * * it shall not be construed to affect the innocence or guilt of the accused, nor be referred to by any attorney in the cause, nor be considered by the Court or jury before whom the trial takes place.' Under these statutory provisions it is clear that a defendant who offers himself as a witness cannot be cross-examined except as to such matters as may be referred to by him in his examination in chief, and it would seem to follow necessarily from this, that the comments on his evidence should be confined to such matters as he testified about in his examination in chief and cross-examination. If a cross-examination is limited only to such matters as the witness testified to in chief, upon what principle can the right be maintained to comment in argument upon matters about which a cross-examination under the statute would not have been allowed?

The statute having conferred the right upon such a defendant when he takes the stand to testify only in regard to such matters as he may choose, this right of choice would in effect be taken away by a ruling which would justify comments to be made, and unfavorable inferences to be drawn from what he might have testified about, but about which he did not testify. Under this statute the defendant has two options, the first of which is that he may elect either to go on the stand or not, as a witness; and second, when he elects to go on the stand he may testify only to such matters as he may choose. It is clear that, under the statute, if he elects not to go on the stand, the fact that he did not testify at all could 'neither be construed' to affect his innocence or guilt, nor be referred to by any attorney in the case.

If the statute forbids comment upon what he might have sworn to when he elects not to go on the stand, why does it not *in its essence and spirit*, when he elects to testify, also forbid comment upon *what he might have sworn to while on the stand and which he elected*, as under the statute he had the right to do, *not to testify about?* * * * It has been held in a number of cases, that when a trial Court allows such a defendant to be cross-examined as to matters not referred to, in his examination in chief, that such action would be reversible error. And if that would be reversible error, *why would it not be reversible error to allow comment to be made upon what would be reversible error if brought on cross-examination?*

In the present case the defendant only testified to the fact that he never 'got any bottle of medicine from Hub Wright and had nothing to do with it'. Now, if, on his cross-examination, he had been asked, 'where were you on the night this larceny was committed?' and he had been required to answer over his objection, and

had answered he was in Hermitage, or if he had been asked, 'were you at Cross Timbers on the night of the larceny?' and he had answered that he was not, and the prosecuting attorney had or not commented on this evidence thus brought out, under our rules in the following cases the judgment, if rendered against him, would have to be reversed: *State v. Porter*, 75 Mo. 171; *State v. Douglass*, 81 Mo. 231; *State v. McLaughlin*, 76 Mo. 320; *State v. Patterson*, 88 Mo. 88; *State v. Chamberlain*, 89 Mo. 129. In the case last cited it is said: 'And it has been uniformly held that no questions can be asked the defendant on cross-examination except of the character designated by the statute. In this instance the questions propounded to the defendant were altogether beyond the confines of the statute. This error must cause a reversal.'

If it is reversible error to enquire on cross-examination about a matter not referred to in the examination in chief, why is it not reversible error if the prosecuting attorney comment upon a matter concerning which, if the defendant had been required to testify, the judgment would be reversed? Any other ruling or construction of the statute would necessarily have the effect of compelling a defendant in a criminal case either to elect not to go on the stand at all as a witness, or if he elected to go on the stand, to compel him to testify fully in regard to all matters connected with the charge, even though he might thereby criminate himself.

For the error committed in allowing the prosecuting attorney to comment without rebuke (after the attention of the Court had been called to it) as to what defendant might have testified about, but did not testify about, the judgment will be reversed and the cause remanded.' (Italics ours.)

This authority is directly applicable to the situation in the case at bar for, as we have seen, it is the well settled rule in the federal Courts and in the Courts of the State of California, that the right of cross-examination is restricted to matters inquired of in chief.

In the case of *State v. Saunders*, 14 Oregon 300; 12 Pac. 441, 444, 445, it was held to be error to permit the accused to be asked on his cross-examination questions not relating to facts to which he had testified on his examination in chief with a view to discrediting him.

The language employed in this case is so illustrative and apposite, upon the proposition that the cross-examination of a defendant should be limited to matters covered by the examination in chief, that we quote liberally:

“The statute of this state which permits a defendant in a criminal case to offer himself as a witness in his own behalf provides that the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified tending to his conviction or acquittal. Laws 1880, pp. 28, 29. The question, therefore, is how far he subjects himself to cross-examination, under that statute. It is very likely that, if the statute contained no limitation as to the extent of the cross-examination of a defendant in such a case, he would occupy the same footing as any other witness, if he chose to take the stand, although some of the decisions from the states in which no limitation is imposed upon the cross-examination hold that the cross-examination of a defendant, in such

a case, should not there be allowed the same latitude permitted in the cross-examination of a witness not a party defendant. The ground of the distinction was an apprehension that the defendant, in such case, might be convicted of one offense upon his admission that he had committed others. *People v. Brown*, 72 N. Y. 571. It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross-examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege; but, as regards the party accused, such examination operates as a two-edged sword. It would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is as pure as the icicles which form on Diana's temple, he had better keep off the witness stand if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they

must disregard the evidence except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable but that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture, and speculate why he pursued such course, and often, very probably, they would draw an unfavorable inference from the circumstance."

This is another case cited approvingly by the U. S. Supreme Court in the case of *Fitzgerald v. United States*, *supra*.

It follows that a prosecuting attorney should not be permitted to comment or draw unfavorable inferences because the defendant has failed to deny or explain matters as to which he properly could not be cross-examined, and, of course, for the same potent reasons, the trial Judge, in his charge to the jury, should not be permitted to comment upon the failure of the defendant to deny or explain matters as to which he could not properly be cross-examined or instruct the jury as did the trial Judge in the case at bar.

The case of *Williams v. United States*, 168 U. S. 509; 42 L. Ed. 509, is also in point. In that case the trial Judge had instructed the jury, among other things, to the following effect:

"Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary con-

clusion may be considered, although this attitude of the case alone would not be entitled to much weight, because the burden of proof lies on the prosecution to make out the whole case by sufficient evidence; but when proof of inculpat- ing circumstances had been produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and to show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charges. Therefore, if in this case the defendant could have produced testimony explaining his several deposits in the San Francisco Savings Union and the Hibernia bank during the months of September, October, November, and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make would have been, if made, adverse and prejudicial to the defense."

It will be noted that the above instruction is very similar to the objectionable instruction given in the case at bar. The Supreme Court of the United States held such an instruction to be erroneous and reversed the case, with directions to grant a new trial, saying:

"The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In

our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, *as well as what it said to the jury on that subject.*” (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit, in the case of McKnight v. United States, 115 Fed. Rep. 972, Circuit Judge (now Mr. Associate Justice) Day, delivering the opinion, entered very fully into the subject of the constitutional right of the defendant not to be compelled to be a witness or to furnish any incriminating evidence against himself, and, in an elaborate discussion, shows how jealous the courts have been to protect a defendant from any illegitimate and unconstitutional practices subversive of this constitutional right and prevent any comment whatever by prosecuting attorney or Judge because of his failure to testify. The opinion is highly interesting upon the subject in general and its rationale directly applicable to the case at bar.

The rule in the State of California is thoroughly well settled that where a defendant takes the stand and testifies, his failure to testify upon any particular point cannot be commented on in the argument by the prosecuting attorney or by the Court in its charge to the jury.

In the case of *People v. O'Brien*, 66 Cal. 602, it is held that a defendant in a criminal prosecution, who has become a witness in his own behalf, cannot be cross-examined as to any facts or matters not

testified to by him on his examination in chief, and if the trial Court permit a more extensive cross-examination, the right secured to the defendant by section 13, article 1 of the constitution of the State of California, declaring that no person shall "be compelled, in any criminal case, to be a witness against himself", is violated.

In the case of *People v. Sanders*, 114 Cal. 216, 238, one of the leading authorities on the subject in the State of California, the opinion of the Court being delivered by Justice Henshaw, the Supreme Court of this state said:

"We note no other points presented by appellant that seem to call for especial comment, saving the objection of the argument of the district attorney before the jury. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney in argument commented on this, saying that if it was in the same condition now as it had previously been, the defendant, better than anyone, could have explained and testified to that fact. *Defendant's failure to testify upon any particular point could not be commented on in argument.* (*People v. McGungill*, 41 Cal. 429; *State v. Fairlamb*, 121 Mo. 137.) For the foregoing reasons the judgment and order are reversed and the cause remanded for new trial."

This authority is directly applicable to the repeated flagrant infractions committed by the prosecuting attorneys in the case at bar, in both their opening and closing arguments, in commenting, over

the constant objections of counsel for defendant and without any rebuke or check from the trial Judge, upon defendant's failure to deny or explain certain matters which they considered pregnant with guilt.

In the case of *People v. McGungill*, 41 Cal. 429, it was held that the fact that a defendant offers himself as a witness in his own behalf does not change or modify the rules of practice, with reference to the proper limits of a cross-examination, and does not make him a witness for the state against himself.

It was further held that, in such a case, it is irregular for the counsel for the prosecution, against the objections of the defendant's counsel, to comment, in his argument to the jury, upon the refusal of the defendant to be cross-examined as to the whole case; and for the Court to permit a continuation of such comments, against such objections, is erroneous and prejudicial to the rights of the defendant.

The Supreme Court of California said:

“It appears from the bill of exceptions that ‘one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner.’ This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was

he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross-examined in the whole case; that defendant's counsel protested against said comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, as against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (*People v. Tyler*, 36 Cal. 522.)

The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as the circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned."

For an excellent statement of the general law on this subject, we commend the opinion of Chief Justice Sawyer (afterwards United States Circuit Judge) in the case of *People v. Tyler*, 36 Cal. 522, 527 et seq.

In the case of *State v. Elmer*, 115 Mo. 401, it was held that the right of a prosecuting attorney to comment on the testimony of a defendant who has testified in his own behalf extends no further than does the right to cross-examine such defendant as to

matters testified to by him in his direct examination. The character of the comments made by the prosecuting attorney in the case cited are identical with the obnoxious comments made in the case at bar. In his opening argument, Mr. Roche said, among other things: "I say that they did not dare—I use that word advisedly—that the defendant did not dare to take the stand and contradict the testimony of these girls" (Transcript of Record, p. 418). To which language exception was taken by counsel for defendant. The Supreme Court of Missouri, in considering identical language, said:

"The bill of exceptions shows, however, that the defendant was sworn as a witness in his own behalf and that the prosecuting attorney in his closing remarks to the jury, among other statements, said that: '*Although the defendant was sworn on his own behalf he nowhere denied that he received the money from Minnie Lay. Neither did he deny but what he was guilty.*' That '*his attorney did not dare to ask him these questions while on the stand, and why did they not ask him these questions of importance? Gentlemen, they did not dare to ask them!*' These statements were objected to at the time and the attention of the court called to them and asked to rebuke the attorney making them, but the court did not sustain the objection or pay any attention to it.

Defendant had stated while on the witness stand that on Saturday, the day next preceding the night on which the money is alleged to have been stolen, he had a \$20 bill, two tens, and \$7 or \$8 in money. He was not asked on his direct examination how or where he got it, or whether he was guilty as charged or not. But he did state on his cross-examination that he worked

for it, that he got in a little game or so in Kansas City, Kansas, and that he ran a little game in Albuquerque.” (*Italics ours.*)

After referring to a number of decisions in the State of Missouri, the Supreme Court continued:

“Governed, then, by the rule announced in these decisions the state would have had no right to cross-examine the defendant as to where and how he got the money, had it been objected to, or whether he was guilty of having stolen it, and if he had not gotten it from Minnie Lay. If then this be the rule as laid down by this court, and we so understand it, the remarks objected to as herein set forth were entirely out of the record, unauthorized by the evidence in the case and prejudicial to the rights of defendant.

Counsel in addressing juries in cases of this character have frequently been admonished by this court of the impropriety of making statements unauthorized by the evidence and facts, and thus inject error for which they have been and must continue to be reversed. We regret the necessity of having to reverse this case, as we are compelled to do under repeated adjudications upon the ground alone of the remarks of the prosecuting attorney in his closing address to the jury. The judgment is reversed and the cause remanded. *All concur.*”

In the case of *State v. Fairlamb*, 121 Mo. 137, 150, the Supreme Court said:

“Much of the closing argument of the counsel for the state in his address to the jury was out of place, and should not have been permitted by the court in any case, much less upon a trial when the life of a human being was at stake. *State v. Ulrich*, 110 Mo. 365; *State v.*

Warford, 106 Mo. 55; State v. Young, 105 Mo. 634; State v. Young, 99 Mo. 666; State v. Jackson, 95 Mo. 623. Counsel in their argument should be confined to the record, the facts in proof and instructions of the court, but may properly draw, by way of argument, any deduction that naturally flows therefrom.

"It was improper to comment on defendant's failure to testify to any particular fact. State v. Graves, 95 Mo. 510; State v. Elmer, 115 Mo. 401; State v. Walker, 98 Mo. 118." (Italics ours.)

Taking up another phase of this argument, it is to be observed that a reading of the trial Judge's charge to the jury, containing the erroneous instructions, to which our assignments of error are addressed (Assignments of Errors Nos. 206, 207) will disclose that the trial Judge appreciated, and in fact so instructed, the jury, that:

"It was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked on cross-examination as to matters not covered by his direct testimony." (Transcript of Record, p. 439.)

But, the learned trial Judge immediately nullified this instruction by continuing as follows:

"But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, (as has been stated to you by counsel for the government) to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled

to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but *where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.*" (Transcript of Record, pp. 439, 440.)

These instructions were, obviously, inconsistent with each other, contradictory, confusing and must have misled the jury. The jury was told, in one breath, that it was the "defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony", and, in the very next breath, the jury was told, if he did avail himself of his privilege, that, "in passing upon the evidence in the case for the purpose of finding the facts, you have a right (as has been stated to you by counsel for the government), to take this *omission of the defendant into consideration*", and further dilated upon and intensified this erroneous instruction by adding:

"But where a defendant elects to go upon the stand and testify, he then subjects himself

to the same rule that applies to any other witness, and if he has failed to deny or explain facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence." (Transcript of Record, p. 440.)

7 Ency. of U. S. Sup. Ct. Repts., tit. "Instructions", p. 33, sec. 9, and cases cited.

It is plain that the trial Judge told the jury, at the outset, that the defendant was well within his rights in limiting his testimony, but he practically takes that all back when he instructs the jury that it may take this "omission into consideration". He instructs the jury that it is a right of the defendant to limit his testimony, but he immediately follows that up by practically telling the jury that if a defendant avails himself of this right it is *to be considered against him*. We respectfully submit that it is too plain for argument that the trial Judge committed error, in charging the jury as he did.

There is another aspect of the erroneous instructions excepted to and made the basis of these assignments of errors, as well as the rulings of the trial Court, and its comments, during the opening and closing arguments of the prosecuting attorneys, which compels us further to complain about these instructions.

The instructions as given, we respectfully insist, are in direct conflict with and contrary to that portion of the charge to the jury regarding the doctrine of the presumption of innocence and of reasonable doubt.

What was the effect of these instructions? The trial Court said, in effect, that by reason of the fact that the defendant had taken the stand as a witness for himself, that, perforce, the jury could disregard the prior instruction of presumption of innocence. In other words, that the probative effect of the presumption of innocence had lost its efficacy and could be disregarded by the jury in arriving at its verdict. That the burden of proof had shifted and that the moment defendant took the stand it was incumbent upon him to prove himself innocent. Has a trial Judge in a criminal prosecution the right to so instruct? If that is the law, then no defendant in a criminal case could safely take the stand to refute any statement or be sworn for any purpose.

Mr. Justice Harlan, in *Davis v. U. S.*, 160 U. S. 469, on pages 486-7, placing the burden of proof on a plea of insanity in a criminal case, says:

“In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely

control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged."

Upon the point that the presumption of innocence is legal evidence for the jury, Mr. Justice White, in the Coffin case, 156 U. S. 432, at pages 459, 460 and 461, says:

"In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

Greenleaf thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore, evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled.*' (On Evidence, Part 1, Sec. 34.)

The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.

Whether thus confining them to 'the proofs' and only to the proofs 'would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. 'The proofs and the proofs only' confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him."

That the rule invoked by the trial Court below is the rule in civil cases is well established. But in criminal cases, where the witness failing to disclose is the *defendant himself*, another rule must prevail.

Mr. Justice White in the thoroughly considered case of *Coffin v. U. S.*, 156 U. S. 432, 39 L. Ed. 481, very ably defines and differentiates the doctrines of presumption of innocence and reasonable doubt in criminal cases.

From Mr. Justice White's definition, it will very clearly be seen that the presumption of innocence permeates the whole case and is to be carried through and delivered to the jury as *legal evidence* to be placed in the scales of justice with the evidence adduced upon the trial on behalf of the defendant.

"The principle that there is a presumption of innocence in favor of the accused is the un-

doubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law."

9 Ency. U. S. Sup. Ct. Repts., title "Presumption and Burden of Proof", I, F, 2, p. 623, and cases cited.

The rule is as binding upon the Courts as though expressly contained in the federal constitution. It is fundamental; and, being such, is indispensable to a fair trial in the prosecution of criminals in this country. It is a probative legal fact which *must* go to the jury with all the other evidence and testimony.

"Innocence is presumed in a criminal case until the contrary is proved: or, in other words, reasonable doubt of guilt is in some cases of the kind ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction; but the presumption of innocence as probative evidence is not applicable in civil cases * * *."

Lilienthal's Tobacco v. U. S., 97 U. S. 237.

In the case at bar, the trial Court, after instructing the jury as to the presumption of innocence of the defendant, continued as follows:

"But where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circum-

stances in reaching their conclusion as to his guilt or innocence.” (Transcript of Record, p. 440.)

Therefore, as above stated, we respectfully insist that the above instruction is in direct conflict with and contrary to that portion of the trial Judge’s charge to the jury regarding the doctrines of presumption of innocence and of reasonable doubt.

Furthermore, the instructions were unconstitutional.

The Supreme Court, in *Councilman v. Hitchcock*, 142 U. S. 547, 585, said:

“It is quite clear that legislation cannot abridge a constitutional privilege * * *.”

The same rule applies with equal force to the other branches of our government.

When the Court below instructed the jury to the effect that it could construe defendant’s silence as corroborative evidence of all the material evidence adduced against him, the instruction was in direct conflict with amendment V. It abridged a constitutional privilege. “Nor shall (any person) be compelled in any criminal case to be a witness against himself.” The instruction made the defendant a witness against himself. His silence was legal evidence. As we have shown under another assignment of error, the prosecution could not elicit this evidence by cross-examination of defendant. Neither could the prosecution call the defendant for its witness and compel him to corroborate

its evidence. How then can the Court compel the defendant to so testify? This is the effect of the charge. The Court accomplished for the prosecution what the law and the constitution forbid the prosecution to bring to pass.

“These statutes, (authorizing a defendant in a criminal action to testify in his own behalf), however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.”

Cooley’s Constitutional Limitations, (original paging) 317.

Without multiplying authorities or indulging in further argument on this subject, and keeping always in mind that the prosecuting attorneys did not ask the defendant a single question on cross-examination, we respectfully submit that serious and reversible errors were committed both by the trial Judge and the prosecuting attorneys:

(1) The latter committed flagrant and unpardonable errors in repeatedly and insistently commenting, both in their opening and closing arguments, over the many objections of counsel for defendant and without any rebuke or check from the trial Judge but, on the contrary, with his sanction and approval, upon the failure of the defendant to deny or explain certain matters, which they deemed of an incriminating nature, and as to which the defendant could not properly be cross-examined;

(2) The trial Judge likewise committed serious error in permitting and sanctioning the prosecuting attorneys, both in their opening and closing arguments, and against the repeated objections of counsel for defendant, to comment upon defendant's failure to deny or explain acts which they deemed of an incriminating nature, and as to which he could not properly be cross-examined; even going so far, on several occasions, as to state to counsel in the presence of the jury that he would instruct the jury substantially in accord with the arguments of the prosecuting attorneys;

(3) Finally, the trial Judge committed serious and reversible error in instructing the jury as he did.

IV.

The Court Erred In Its Refusal to Instruct the Jury, As Requested by Counsel for the Defendant: (1) to Determine From All the Evidence and Circumstances in the Case, Under Appropriate Instructions, Whether Marsha Warrington and Lola Norris, or Either of Them, Were Accomplices of the Defendant; and (2) if the Jury Should Arrive at the Conclusion, Under Such Instructions, that Marsha Warrington and Lola Norris, or Either of Them, Were Accomplices of the Defendant to Further Instruct Them That the Testimony of an Accomplice Should be Received With Caution and Weighed and Scrutinized with Great Care by the Jury and the Jury Should Not Regard the Evidence of an Accomplice Unless She Is Confirmed and Corroborated in Some Material Parts of Her Evidence.

The learned trial Judge refused to give any of the instructions requested by counsel for defendant upon the subject of accomplices, basing such refusal upon the ground that he did not consider Marsha Warrington and Lola Norris, or either of them, accomplices of the defendant.

In this view, he was clearly in error. The conviction of the defendant upon the first count of the indictment, if such conviction can be sustained at all, depended entirely upon the testimony of Marsha Warrington and Lola Norris, or of either of them. It is our contention that there is no evidence at all in the record to sustain the conviction, but, assum-

ing, for the sake of argument, that the testimony of Marsha Warrington and Lola Norris, or either of them, was sufficient for any purpose at all in the case, we stoutly maintain that there was evidence tending to show that they were accomplices of the defendant, and the Judge of the Court below should have submitted to the jury, under appropriate instructions, first, the question whether or not they were accomplices, and, second, should have given the cautionary instructions applicable to the testimony of accomplices, which it is the almost universal practice for all Courts, state and federal, to give.

The requested instructions on this subject, which the trial Judge refused to give, to which refusal counsel for defendant took timely exceptions and have embodied said exceptions in proper assignments of error, are as follows:

“The Court erred in refusing to give to the jury instruction Number 32 requested on behalf of defendant, which instruction is in the words and figures following, to wit:

When a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, these parties co-operating are accomplices, the one with the other, because their conduct is corrupt, and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary.” (Transcript of Record, pp. 99, 446, 449, 450; Assignment of Error No. 155.)

“The Court erred in refusing to give to the jury instruction No. 33 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are instructed that every person of legal responsibility who voluntarily co-operates with, or aids, or assists, or advises, or encourages another in the commission of a crime, is an accomplice, without regard to the degree of his guilt, and without regard to whether or not they may be indicted as principals. One is an accomplice for what he has done, and not because of the form of punishment which the law may mete out for his acts.” (Transcript of Record, pp. 99, 446, 450; Assignment of Error No. 156.)

“The Court erred in refusing to give to the jury instruction No. 34 requested on behalf of defendant, which instruction is in the words and figures following, to wit:

I instruct you, as to the witness, Lola Norris, if you believe her testimony, that she is an accomplice of the defendant, and, in this connection, I further instruct you that while it is permissible in the federal Courts to convict upon the uncorroborated testimony of an accomplice, still I further instruct you that before convicting the defendant on the uncorroborated testimony of an accomplice, you should view their testimony with great care and caution.” (Transcript of Record, pp. 99, 100, 446, 450; Assignment of Error No. 157.)

“The Court erred in refusing to give to the jury instruction No. 35 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that the testimony of accomplices, if you should believe and be satisfied beyond all reasonable doubt and to a moral certainty that Marsha Warrington and

Lola Norris, or either of them, were the accomplices of the defendant, should be received with caution and weighed and scrutinized with great care by the jury, and their evidence should not be accepted or regarded by the jury unless they are confirmed or corroborated in some material parts of their evidence connecting the defendant with the offense charged.” (Transcript of Record, pp. 100, 446, 450, 451; Assignment of Error No. 158.)

“The Court erred in refusing to give to the jury instruction No. 101 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are hereby instructed that the testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another accomplice.” (Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 186.)

“The Court erred in refusing to give to the jury instruction No. 102 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are hereby instructed that if you believe the testimony of Marsha Warrington and Lola Norris, or of Marsha Warrington, or of Lola Norris, then they are both accomplices with the defendant, and their testimony should be received with caution and weighed and scrutinized with great care by the jury and you should not regard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his or her evidence connecting the defendant with the crime by unimpeached testimony.” (Transcript of Record, pp. 114, 446, 463; Assignment of Error No. 187.)

There was testimony introduced during the trial, amply justifying the giving of the requested instructions. The testimony of the defendant Caminetti himself was alone sufficient to require the trial Judge to give the requested instructions. He testified, among other things, as follows:

“Mr. Diggs said: ‘I have just come up from San Francisco and my father is coming up Monday to have you and Lola and Marsha arrested; he claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.’ He said, ‘I tried to keep him from coming up, but I could not, and he will be up here tomorrow morning.’ That is about the substance of what he said. He went over it and enlarged upon it. I replied, ‘Then, I am gone.’ I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go and when he said that Miss Warrington said, ‘I am going too, I can’t stay here if you leave.’ And Lola—Miss Norris said—that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen but she could not leave. *Thereupon Miss Warrington turned around and said ‘Lola, I am going and you have got to go too’.*” (Transcript of Record, p. 407.)

This testimony certainly placed Miss Warrington in the attitude of an accomplice.

It is true that both Marsha Warrington and Lola Norris denied that Miss Warrington had made any

such statement to Miss Norris. Miss Warrington testified, on redirect examination:

“I never advised Miss Norris to take this Reno trip. I told her she could do exactly as she pleased.” (Transcript of Record, p. 278.)

Miss Norris testified as follows:

“Miss Warrington and I talked about it when we were alone several times, and we both had our opinions on the matter, but Miss Warrington never told me that I had to go or asked me to go, or anything of the kind.” (Transcript of Record, p. 300.)

But the truth of this testimony was for the jury to pass upon and determine. It being clearly a question of whom the jury should believe, whether the testimony of the defendant Caminetti or the testimony of the two young women, their credibility was of the greatest importance, not only the credibility of the defendant but the credibility of the two young women. If the testimony of the defendant was true, then certainly Marsha Warrington was an accomplice with the defendant. She became such from the moment that she “turned around and said, ‘Lola, I am going and *you have got to go too.*’” Aside from this poignant piece of evidence, the record is replete with many other acts and statements of Marsha Warrington showing her active complicity.

It was of the greatest importance to the substantial rights of defendant that appropriate instructions should have been submitted to the jury

as to what act or acts or conduct constituted one an accomplice, and, furthermore, that the jury should have been carefully instructed as to what weight should be attached to the testimony of an accomplice, and also it should have been instructed that one accomplice cannot corroborate another accomplice. The learned trial Judge declined to give any instructions whatever on this subject.

A perusal of the testimony in the record, particularly the testimony of Marsha Warrington and of Lola Norris, will disclose the pernicious activity of Marsha Warrington in inducing Lola Norris to accompany them from Sacramento, California, to Reno, Nevada. She was the intimate and almost constant companion of Lola Norris. She was somewhat older than Lola Norris, her age being 22 and that of Lola Norris being 20. She had the highest incentive to leave Sacramento on account of her delicate condition, and naturally wanted her intimate friend, Lola Norris, to accompany her. She participated in almost all of the interviews at which Maury I. Diggs and Lola Norris were present. She took a leading part at the important interview held on Sunday, March 9, 1913, when both she and Lola Norris decisively made up their minds to leave Sacramento. At this all-important meeting Maury I. Diggs was present with Marsha Warrington and Lola Norris, but it is a most significant fact that the defendant Caminetti was absent from that meeting. It was Marsha Warrington who took a suit case with her containing articles

of wearing apparel and for female toilet use. Miss Norris took nothing with her or comparatively little. Miss Norris testified:

“I took some handkerchiefs in preparing to go to Reno. *Miss Warrington took quite a number of articles.* I was present when she was packing her valise. I did not help her pack her valise. She was packing her valise in her own house. Her father and mother were out some place during the time she was packing her valise. They were out when we got to her house. At that time, when Miss Warrington was packing her valise, it was not our intention to go to Reno. It was our intention to go some place; we told Mr. Diggs we would go. But not to Reno, just simply to get out of town. We had decided to go, yes, sir. At the time when I was present at Miss Warrington’s house when she was packing her valise, neither Mr. Diggs or Mr. Caminetti were there. Just we two were there alone. At that time we did not discuss ourselves as to whether we would go out of town or whether it was best to go out of town. We discussed all of that before. I was frightened. She was frightened, I think so, yes sir. I did not say at that time to her, or she to me, if all of these things are going to come out we had better skip and get out of town. We said all that before. I did not take any baggage along because Mr. Diggs told us not to take any. *I know Miss Warrington took baggage along, but I didn’t want my mother and father to see me leaving the house with a valise. We were in fact leaving home surreptitiously. It is the fact I did not want my father and mother to see me with any baggage.* Then we went down to the Saddle Rock Restaurant. Miss Warrington and I together. We took a street car. In the meantime Miss War-

rington left her suit case in the drug store. I don't know if she said anything to the man in charge as to why she left it; I did not go in with her. *She did not want to bring the valise to my house.* I went from her house to my house. I wanted to tell my folks good bye. I told them I was going that night to spend the evening with a friend—that is all. We talked for about half an hour on the porch. I said who the friend was. It was a friend of Miss Warrington's and mine. It was a lady friend. I told my father and mother where I was going. I volunteered it. I did not cry at the house when I said good bye. I cried after I left the house. I did not say I was going to stay there over night. I said I was going to stop at Miss Warringtons' over night. Prior to that time I had been out nights at Miss Warrington's house. Not very often during the six months preceding this trip to Reno. Miss Warrington has been to my house at nights. Several times, three or four." (Transcript of Record, pp. 323, 324.)

Miss Warrington testified:

"The next time I met Mr. Diggs, after this Saturday afternoon at the Peerless, was the next afternoon. I met him at the Plaza, at 28th and 'J'. *At that time Mr. Caminetti was not present. Just myself and Miss Norris and Mr. Diggs.* In the meantime, myself and Miss Norris had decided not to go. I am positive I had made up my mind I would not leave the City of Sacramento, absolutely under no circumstances. And it was at this conversation with Mr. Diggs, *at which time Mr. Caminetti was not present*, that we again made up our minds to go. That was Sunday afternoon. We were out there two hours I think. And we discussed *all the unfortunate conditions which sur-*

rounded Miss Norris and myself at that time. Miss Norris also decided to go then and there. Then we went to our homes. I went to my home and got a grip. I put in some clothes for myself and then went to Miss Norris' house. Miss Norris at that time was very much worried and excited, we were both very much worried. When I went to my home to get my few articles of clothing, I saw members of my family. I talked with them. I did not tell them that I was going away. Up to that time they had no knowledge of my condition. I said I was going out to spend the evening. Then I went to Miss Norris'. I went with her to her house. I saw some of her family. I did not say anything to any of them about where we were going. She in my presence did not say anything to her family. I was with her all the time. I did not tell her mother that we were going out to stay with some friends. We said we were going out to spend the evening. I did not take my suitcase or my grip in the presence of Mrs. Norris. We left it at the drug store. I did not say that Miss Norris took any bag. I think she had a skirt and a waist underneath her dress, or something like that. I took my grip to the drug store before going to Mrs. Norris' house. I did that in order that Mrs. Norris' or her family would not see it. We had not seen Mr. Caminetti at all that day." (Transcript of Record, pp. 264, 265.)

A mere reading of these excerpts from the testimony of Miss Norris and Miss Warrington, aside from the direct and positive testimony of the defendant that Miss Warrington insisted upon Miss Norris accompanying her, discloses the pernicious activity of Miss Warrington in inducing, and aiding and assisting, Miss Norris to accompany her

on the trip from Sacramento, California, to Reno, Nevada.

Furthermore, the testimony of these two young women discloses beyond question that Lola Norris was not an innocent "victim" of any act of the defendant conducing to her transportation; on the contrary, the evidence shows that she went willingly and of her own free will and with the single purpose, at the time of her departure from Sacramento and until *after she had passed the state boundary line between California and Nevada*, to escape impending notoriety, scandal and disgrace as the result of her indiscreetness in keeping company with the defendant Caminetti and in associating with Marsha Warrington and Maury I. Diggs. If there was any other purpose in her departure, that purpose was not formed, as will appear in a succeeding portion of this brief, until after the defendant Caminetti and Lola Norris had passed the *boundary line dividing the states of California and Nevada*. In other words, the purpose in leaving Sacramento was not, as is alleged in the first count of the indictment (upon which count alone the defendant was convicted) "that the afore-said Lola Norris should be and become the concubine and the mistress of the said defendant", but the purpose was a different one, entirely disassociated from any object of concubinage.

Lola Norris was not a "victim". She was a willing accomplice, and so was Marsha Warrington. They both "knowingly and voluntarily, and with

common intent with the principal offender, united in the commission of an offense", assuming, for the sake of argument only, that any offense at all was committed by the defendant Caminetti.

The above often cited quotation is taken from the opinion of Judge Maxey in *United States v. Ybanez*, 53 Fed. Rep. 536, 540, where the learned Judge used the following language, so apposite to the case at bar:

"An accomplice 'is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense'.

It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, *always to be received with caution, and weighed and scrutinized with great care by the jury*; and it is usual for the courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice *unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony.*" (Italics ours.)

Some of the requested instructions, which were refused, were, almost word for word, taken from the language of Judge Maxey in the case above cited. (See Transcript of Record, pp. 114, 100; Assignments of Error 158, 187.)

There was ample evidence, as disclosed by the Transcript of Record, which required the trial Judge to submit to the jury, under appropriate instructions as requested on behalf of the defendant, the question, first, whether Marsha Warrington and Lola Norris, or either of them, were accomplices of the defendant; and then, second, if the jury should so find, the cautionary instructions should have been given advising the jury of the weight it should accord to the testimony of an accomplice; and, third, that an accomplice cannot be corroborated by the testimony of another accomplice.

The evidence contained in the Transcript of Record discloses that Lola Norris and Marsha Warrington were willing accomplices with the defendant. They were not coerced. They were not unwilling or innocent victims. The jury acquitted the defendant upon both counts in the indictment in which he was accused of having persuaded or induced or enticed either Lola Norris or Marsha Warrington to leave Sacramento and go to Reno. Aside from this verdict of the jury eliminating from the case any question of persuasion or inducement or enticement on the part of the defendant, a reading of the evidence in the record shows that both Lola Norris and Marsha Warrington were willing accomplices. They come clearly within the definition of what constitutes an accomplice, as laid down by Judge Maxey in *U. S. v. Ybanez*, *supra*.

Furthermore, it is the well settled rule that one of the participants in the act of fornication, or

adultery, or in the act of incest, if the participation *is voluntary and with guilty knowledge*, is an accomplice.

Cyc., vol. 12, pp. 447, 448, and cases there cited.

In the leading case, in California, of *People v. Coffey*, 161 Cal. 433, 447, it was said:

“In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman’s hard lot operate to soften the court’s views. They are accomplices the one with the other because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. (Citing *State v. Scott*, 28 Or. 331, 42 Pac. 1; *Merritt v. State*, 12 Tex. App. 203; *Townser v. State*, 58 Tex. Crim. 453, 137 Am. St. Rep. 976, 126 S. W. 572.)”

Aside from this, the view entertained by the Supreme Court of the United States, and announced in the case of *Bennett v. United States*, 227 U. S. p. 333, one of the leading “white-slave cases” recently decided by the Supreme Court, is in accord with our contention.

It was complained, in that case, that the trial Court had “erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke’s testimony had received”.

We quote from the opinion of the Supreme Court:

“(1) Defendant was indicted for having caused the transportation of *Opal Clarke*.”

* * *

(5) The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the Court erred in its instructions to the jury in regard to the extent of corroboration Opal Clark's testimony had received.

The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: ‘Necessarily, if you find that she was an accomplice with respect to these charges or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it.’ The contention is that this was error, ‘as the Court instructed the jury that there *was* corroborating evidence, when the Court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony’. The objection is hypercritical. The Court did not instruct the jury that there was corroborating testimony, but testimony of that tendency; and added that the force and weight of its corroborating power was for the jury to determine.”

It would seem from the opinion in the above case that there were two girls involved in that transportation, one Opal Clarke and another Ella Parks; just as in the case at bar there are two involved, Marsha Warrington and Lola Norris. We contend that Marsha Warrington was undoubtedly an ac-

complice as to Lola Norris. As the testimony discloses, the defendant testified that she told Lola Norris: "Lola, I am going and you have got to go too." (Transcript of Record, p. 407.) We further contend that inasmuch as whatever Lola Norris did was purely voluntary on her part, she also was an accomplice. The facts in the case at bar bring it squarely within the facts involved in the case of *Bennett v. United States*, upon the proposition of accomplices.

The common law rule, which prevails in the federal Courts, is that a defendant may be convicted upon the uncorroborated testimony of an accomplice. But the practice of the Courts, where such doctrine obtains, is to warn the jury of the danger of convicting unless the accomplice be strongly corroborated. The general rule is well stated in *Greenleaf on Evidence* (6th ed.), vol. 1, p. 493, as follows:

"Sec. 380. The degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally

the practice to give them such advice, that its omission would be regarded as an *omission of duty* upon the part of the judge."

No common law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the Court *should* and *usually does* instruct them to that effect, they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.

Cyc., vol. 12, p. 453;

United States v. Ybanez, 53 Fed. Rep. 536;

United States v. Flemming, 18 Fed. Rep. 907;

United States v. Harries, 26 Fed. Cas. No. 15309, 2 Bond. R. 311;

United States v. Smith, 27 Fed. Cas. No. 16322, 2 Bond. R. 323;

United States v. McKee, 26 Fed. Cas. No. 15685, 3 Dill. R. 546;

United States v. Lancaster, 26 Fed. Cas. No. 15556, 2 McLean R. 431;

United States v. Reeves, 38 Fed. Rep. 404;

United States v. Van Leuven, 65 Fed. Rep. 78;

United States v. Sykes, 58 Fed. Rep. 1004;

United States v. Kessler, Bald. R. 22;

United States v. Sacia, 2 Fed. Rep. 708;
 People v. Bonney, 98 Cal. 278;
 People v. Coffey, 161 Cal. 433.

See, also sec. 1111, Penal Code Cal.

The trial Court not only declined to instruct the jury in the language requested by counsel for defendant, but failed to give any instructions at all to the jury advising them to be cautious in convicting upon such testimony, and as to what weight should be accorded such evidence.

Although an accomplice is a competent witness for the prosecution, his testimony should be received with *great care and caution*.

United States v. Smith, Fed. Cas. No. 16322;
 United States v. Babcock, Fed. Cas. No. 14487;

United States v. Goldberg, Fed. Cas. No. 15223;

United States v. McKee, Fed. Cas. No. 15686.

Except in one state, it seems to be the well established and almost universal practice for the Court to instruct that the testimony of an accomplice should be viewed by the jury with *great care and caution*.

See cases cited in Blashfield on Inst. to Juries, p. 485.

And a refusal to so instruct is ground for reversal.

Solander v. People, 2 Colo. 48;
 Cheatham v. State, 67 Miss. 335;

People v. Sternberg, 111 Cal. 11;
 People v. Strybe, 36 Pac. Rep. 3;
 People v. Bonney, 98 Cal. 278;
 People v. Coffey, 161 Cal. 433.

A conviction founded on the uncorroborated testimony of an accomplice is legal, although it is *almost universal practice, sanctioned by long usage and deliberate judicial approval*, to instruct juries to be *cautious* in convicting upon such testimony.

United States v. Neverson, 1 Mackey, 152;
 United States v. Bicksler, 1 Mackey, 341;
 State v. Hyer, 39 N. J. Law;
 State v. Honey, 19 N. C. 390;
 State v. Miller, 97 N. C. 484.

In United States v. Sykes, 58 Fed. Rep. 1000, 1004, Judge Dick, in charging the jury, said:

“The degree of credit which ought to be given to the testimony of an accomplice is a matter *exclusively within the province of the jury*, and they may believe and act upon such evidence without any confirmation of his statements. But it is the *duty* of the judge to advise the jury to consider such testimony with *great caution*, and not to regard it as worthy of credit *without* corroboration by other evidence material to the issues before them. In doing so, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony.”

In Hanley et al. v. United States, 123 Fed. Rep. 849, it was held that a defendant in a criminal case in the federal Courts cannot complain because the

testimony of an accomplice was submitted to the jury, *under instructions that it should be received with caution and carefully scrutinized.*

There is a total want of such instructions in the case at bar.

In *United States v. Van Leuven*, 65 Fed. Rep. 78, 81, District Judge Shiras said:

“At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the crime. *I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury THAT THEY CANNOT CONVICT UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.*” (Italics ours.)

The defendant in the case at bar is a citizen of the State of California, and there is a statute in the State of California similar to that enacted in the State of Iowa.

See section 1111 of the Penal Code of California.

We respectfully submit that the remarks and the course invariably pursued by District Judge Shiras are peculiarly applicable to, and should have been followed in, this case by the trial Court.

There is a statute in Texas similar to section 1111 of the Penal Code of California, and in the case of *Martin v. State*, 36 S. W. 587, the Court of Criminal Appeals of Texas, in reversing a case for the failure of the trial Court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices, said, after quoting the statute of that state as to accomplices:

“By a long line of decisions, it has been held that, where the state in a criminal prosecution introduces evidence of accomplices, it is incumbent on the court to give in charge to the jury the above article, and then, in all proper cases, to define who are accomplices, or what it takes to constitute persons accomplices in the commission of crime. *This charge should be given, whether asked or not*; but it is especially incumbent on the court, when the matter is pointed out by a bill of exceptions, to give the law on accomplice’s testimony in charge to the jury. (Citing many cases.) It is not necessary to discuss the testimony of said witnesses. The evidence not only tends to show that said three witnesses were accomplices, and that their testimony was materially prejudicial to the defendant, but the record establishes that the State’s case is mainly based on their evidence; and *why the learned judge should have omitted, in a case of this importance, to give to the jury a charge on accomplice’s testimony, especially when an exception was taken to his charge in this regard, is to us inexplicable.*” (Italics ours.)

Applying the case of *Martin v. State* to the case at bar, and under the rule laid down by District Judge Shiras in *United States v. Van Leuven*, *supra*, it is submitted that the trial Judge was in error in taking the view that Marsha Warrington and Lola Norris, or either of them, were not accomplices and in refusing to instruct the jury as requested by the defendant.

While, technically, the learned Judge of the trial Court may have been correct in refusing to give instructions in the precise language requested by counsel for defendant, nevertheless, the duty rested upon him to give to the jury some appropriate instructions, telling them (to use the language of Judge Maxey) that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury".

The jury was left in total ignorance as to whether, in the first place, the witnesses Marsha Warrington and Lola Norris, or either of them, should be considered accomplices of the defendant, under the evidence adduced; and, in the second place, if the jury should consider them under the evidence and instructions of the Court as accomplices, as to what weight should be accorded to the testimony of an accomplice; and, in the third place, if the jury should consider them both under the evidence and instructions of the Court, as accomplices, it should have been further instructed that: "The testimony

of one accomplice cannot be accepted as sufficient corroboration of the testimony of another.”

Cyc., vol. 12, pp. 458, 549, and cases there cited.

People v. Coffey, 161 Cal. 433.

(Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 186.)

In all of these respects, it is respectfully submitted that the trial Judge was in error and that a reversal of the judgment of conviction must follow and a new trial ordered.

V.

The Court Erred In Refusing to Instruct the Jury to Acquit, and In Refusing to Grant the Motion In Arrest of Judgment, Upon the Ground that There Was No Evidence Sufficient to Justify Submitting the Case to the Jury or to Sustain the Judgment of Conviction.

(Transcript of Record, pp. 412, 45, 48; Assignments of Error Nos. 2, 17.)

The motion to instruct the jury to acquit, followed up, as it was, by a motion in arrest of judgment upon the same ground, was predicated upon the fact that there was no evidence sufficient to justify submitting the case to the jury or to support the judgment of conviction on the first count of the indictment, the only count upon which the defendant was convicted.

Furthermore, the evidence shows that the immoral purpose, if any was formed at all, was *not formed* in the State of *California*, but *was formed* in the State of *Nevada* after the defendant and Loia Norris had *crossed* the boundary line dividing the two states.

Each of these points will be taken up in their order.

Not only did the trial Judge refuse to instruct the jury to acquit, but he took special pains in his charge to the jury, to impress upon them that the evidence adduced was sufficient to make out a case

against the defendant *on all four counts of the indictment*, in the following language:

“As I have indicated to counsel *in passing upon the defendant’s motion to instruct the jury to acquit*, the evidence introduced before you by the Government, if believed by you, *is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of these counts.*” (Transcript of Record, pp. 438, 439.)

The defendant Caminetti was convicted, as heretofore stated, upon the first count of the indictment, which charged him with having (1) transported, and (2) caused to be transported, and (3) aided and assisted in transporting, Lola Norris in interstate commerce, etc., etc.

There is no evidence that he transported, or caused to be transported, or aided or assisted in transporting Lola Norris in interstate commerce. It must be distinctly remembered that the defendant was not charged with a conspiracy to violate the “White-slave traffic Act”, but he was charged with the doing of a *specific act* with a *specific purpose*. (Transcript of Record, pp. 217, 252-253.) We submit that it is not sufficient for the prosecution to show a mere knowledge that some one else committed a violation of law without also proving some participation by the defendant himself in the commission of the alleged violation of law. Much of the evidence that was admitted by the trial Judge in the case at bar related entirely to the actions of Maury I. Diggs and seemed to be admitted by the trial

Judge upon the theory that if the prosecution could show some sort of confederacy, akin to a prosecution for conspiracy, between the defendant Caminetti and Maury I. Diggs, the acts of the latter could be fastened upon the defendant Caminetti. For instance, the witness Marsha Warrington was permitted to testify that she had had sexual intercourse with Maury I. Diggs. (Transcript of Record, pp. 252, 253.) There is not the slightest pretense in the testimony that defendant Caminetti had ever had any sexual relations with Marsha Warrington, or that he had had anything to do whatsoever with the sexual relations existing between Diggs and Marsha Warrington. He was acquitted of having had anything to do with the transportation of Marsha Warrington or of having induced, persuaded or enticed either Marsha Warrington or Lola Norris to leave Sacramento for Reno. The admission of such testimony, relating to acts and conversations had between Maury I. Diggs and Marsha Warrington, at which the defendant Caminetti was not present and with which he had nothing to do, went far afield and way beyond the issues of the case, and was entirely outside of the charges made against the defendant Caminetti. The admission of such evidence undoubtedly was error. The testimony was admitted by the trial Judge upon the theory that the prosecution involved, in effect, a conspiracy or confederacy between the defendant Caminetti and Maury I. Diggs and Lola Norris and Marsha Warrington to commit a violation of law. This is evi-

dent from the rulings of the trial Judge in admitting such testimony, and we beg to refer to the record. For example, Miss Warrington was allowed to testify as follows:

“At the time I left Sacramento for Reno I was pregnant, by Mr. Diggs.” (Transcript of Record, p. 252.)

There is not the slightest pretense that the defendant Caminetti had anything to do with Marsha Warrington's pregnancy. The admission of such testimony could have had no effect other than to prejudice defendant Caminetti in the eyes of the jury, and discloses to what unwarranted lengths the trial Judge went in admitting testimony.

The record further shows:

“Q. Was Mr. Diggs the only man you had ever had intercourse with in your life? A. Yes——

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Oh, I think it is a circumstance.

Mr. HOWE. We note an exception.

The COURT. She has answered the question.

Mr. ROCHE. Q. Where did that first act of intercourse take place? A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *I don't see that that is material.*

Mr. ROCHE. Very well; I won't press it. I would like to ask just one question, though, with reference to that matter. Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or

rather, before that time, and upon that occasion, had you been furnished with any champagne? A. Yes——

Mr. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Yes. I think so. *Well, I don't know about that. I will let the answer stand. The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances.* Proceed.

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time *although not in the same room.* Miss Norris was also in the office at the time *although not in the same room.*” (Transcript of Record, pp. 252-253.)

Such testimony was totally foreign to any accusation made by the indictment against the defendant Caminetti. According to the testimony of Marsha Warrington herself, the defendant Caminetti was *not informed by her* and was *not aware* of the fact that this first act of intercourse had taken place between Diggs and Marsha Warrington upon the occasion testified to by Marsha Warrington. She testifies:

“At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in the room *by ourselves.* Mr. Caminetti and Miss Norris were in *another room.* I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.” (Transcript of Record, p. 280.)

Upon another occasion, the trial Judge again likened the prosecution to one for conspiracy, saying:

“The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. *In such a case it is very much like a prosecution for conspiracy*, only here, of course, it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all, but it all goes to the jury for their consideration.

MR. WOODWORTH. *The point we make is that the defendant is indicted here simply for having violated the White-slave traffic Act. He is not indicted for conspiracy.*

The COURT. Mr. Woodworth, I understand the situation thoroughly and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

MR. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court.” (Transcript of Record, p. 217.)

The above are but two of several instances where the trial Judge admitted evidence of the acts of persons other than the defendant Caminetti upon the theory that the trial of the charges in the indictment, in effect, involved the defendant Caminetti in a conspiracy with Maury I. Diggs, Marsha Warrington and Lola Norris.

As above stated, we challenge the learned prosecuting attorneys to cite, in their reply brief, a single act done by the defendant Caminetti by which he (1) transported, or (2) caused to be transported, or (3) aided or assisted in transporting, in interstate commerce, Lola Norris, etc.

What did he do? What is the act committed by the defendant Caminetti which constitutes a violation of the first count of the indictment? He did not buy the ticket for Lola Norris. Maury I. Diggs did that. He did not request Maury I. Diggs to buy a ticket. He did not furnish Maury I. Diggs with any money with which the latter bought a ticket for Lola Norris. It does not appear that he even carried the dress suitcase that Marsha Warrington had taken with her. He did not buy the Pullman tickets. Diggs did that. In the expressive language of Marsha Warrington, in her direct examination, "Mr. Caminetti *just stood there* with us." (Transcript of Record, p. 249.) Again, on cross-examination, she testified: "Whatever Mr. Caminetti did was merely a silent agreement to everything." (Transcript of Record, p. 263.) And again, she stated: "During the time that Mr. Cami-

netti was there Mr. Diggs did most of the talking, he proclaimed himself boss at that time. *Mr. Caminetti agreed to everything. He agreed to it in a tacit way, I suppose so.*" (Transcript of Record, p. 265.) He accompanied Lola Norris, Marsha Warrington and Maury I. Diggs on the trip from Sacramento to Reno, but merely being present and accompanying these people did not constitute an act of transportation, or cause the transportation, or aid or assist in the transportation. He was no more an active participant than were Marsha Warrington and Lola Norris. He did no more than they did.

It is true that, at the outset, he gave Lola Norris \$20 with which to buy her ticket, but she *never made use of the money for that purpose* and the money was *afterwards returned*, or the greater portion thereof, to the defendant Caminetti by Miss Norris. Miss Warrington testified:

"After Reno was agreed upon at first Mr. Caminetti gave Miss Norris \$20. And he said for her to get the ticket, for herself and me, and Mr. Diggs said, 'No', he thought that he should be boss of the four and he thought that he had better get the tickets. Miss Norris kept the money. Mr. Caminetti said 'All right, you can be boss.' That was said to Mr. Diggs. The way I UNDERSTOOD it *Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.*" (Transcript of Record, pp. 248, 266, 267.)

There is no evidence that Diggs ran short of funds and until he did, there was ever present the

opportunity for repentance on the part of the defendant, the *locus poenitentiae*. Non constat, when Diggs ran short of funds, the defendant might have changed his mind and refused to "spend his money."

Miss Norris testified:

"Mr. Caminetti gave me \$20 to buy my ticket. I don't remember anything he said as to what place we were to go to; we might have made a few remarks, but I don't remember just what they were. * * * When we agreed on Reno, just before Mr. Caminetti left he gave me \$20. I don't know whether he wanted me to buy mine or to buy mine and Miss Warrington's together. Immediately after that *Mr. Diggs said that he would buy the tickets.*" (Transcript of Record, p. 303.)

Later on, she testified that she returned the \$20 to Caminetti, as follows:

"I gave the \$20 back to Mr. Caminetti and then he later gave me \$15 back." (Transcript of Record, p. 309.)

There is not the slightest pretense that any part of this \$15 was ever spent by Lola Norris for any transportation.

The evidence affirmatively shows that at the meeting held on Sunday afternoon (March 9th, 1913), at the Plaza in Sacramento, when Miss Norris and Miss Warrington *definitely* made up their minds to leave Sacramento, the defendant Caminetti was *not there at all*, those present being Maury I. Diggs, Marsha Warrington and Lola Norris. (Transcript

of Record, pp. 264, 301.) It, therefore, cannot be claimed that he counselled or advised them to go. Previous to that occasion, they had determined not to leave Sacramento.

At the conversation held between Maury I. Diggs and Marsha Warrington on the levee, at which Miss Warrington's delicate condition was discussed by Diggs and herself and the subject of going away to relieve her unfortunate condition was first broached, the defendant Caminetti was *not there at all*. (Transcript of Record, pp. 261, 262.)

In view of the very meagre evidence in the case, by which the prosecution strove to connect the defendant Caminetti with some act which might bring him within at least one of the provisions of the "White-slave traffic Act" upon which he was indicted, the trial Judge deemed it proper to instruct the jury as follows:

"As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, *or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs*, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation." (Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

We respectfully submit that, even as to this far-fetched feature of the case, there was no sufficient evidence in law to justify any such view of the acts of defendant Caminetti or the instruction of the trial Judge to the jury above set out.

Marsha Warrington testified:

“The way *I understood it* Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.”
(Transcript of Record, p. 248.)

We have already observed that by the time Diggs spent his money there was ever present the opportunity for defendant Caminetti to repent—the *locus poenitentiae*.

“If one who has counseled or commanded the commission of a crime, or agreed to take part in it, repents and withdraws, to the knowledge of the other party, before the crime is committed, he will not be liable as an accessory.”

Cyc. Vol. 12, p. 192;

Pinkard v. State, 30 Ga. 757.

Lola Norris testified:

“Mr. Caminetti and Mr. Diggs were to share the expenses.” (Transcript of Record, p. 303.)

Miss Norris was, palpably, testifying to her conclusion that Caminetti and Diggs *were* to share the expenses, just as Miss Warrington was testifying to: “The way *I understood it*.” Neither of them pretended to testify what conversation was had between Diggs and Caminetti on this subject. The

record shows that no understanding of any reimbursement whatever by Caminetti to Diggs was ever had.

This is absolutely *all* of the evidence in the case as to what took place at Sacramento at the time of any violation of the "White-slave traffic Act", as alleged in the first count of the indictment (under which the defendant Caminetti was convicted), with reference to any reimbursement for any railroad fares or transportation by the defendant Caminetti to Diggs.

But, even this, on examination, will be found to be no legal evidence at all to uphold the verdict on the first count of the indictment. Marsha Warrington testifies: "The way *I understood it*", etc. Obviously, her *understanding* could not constitute legal evidence against the defendant Caminetti; and, furthermore, being herself an accomplice, she could not be corroborated by another accomplice, to wit, Lola Norris. The latter testifies that, "Mr. Caminetti and Mr. Diggs *were* to share the expenses". But she being likewise an accomplice, corroboration of her testimony by that of Marsha Warrington was of no avail, and, standing uncorroborated, was of no value as evidence to support a judgment of conviction.

We have shown, in a previous portion of this Opening Brief (see pages 147-169), that Marsha Warrington and Lola Norris were the accomplices

of the defendant, and being accomplices, it is well settled that:

“The testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another.”

Cyc., Vol. 12, pp. 458, 459, and cases there cited.

Outside of the testimony, just referred to, of Marsha Warrington and Lola Norris, which, as we have pointed out, is valueless as legal evidence, there is not a scintilla of evidence that Diggs and Caminetti ever did share the expenses involved in the purchase of the railway ticket or of the Pullman ticket, upon which Lola Norris travelled. There is not a shred of competent or legal evidence in the record, justifying the instruction of the trial Judge to the jury that there was the slightest understanding between Diggs and the defendant Caminetti that the defendant was thereafter to contribute to the purchase of the railway ticket by reimbursing Diggs. There was not the slightest evidence of any agreement or understanding between Diggs and defendant Caminetti that the former was advancing the money to pay for the ticket upon which Lola Norris traveled or that defendant Caminetti should ever pay him back. The evidence clearly shows that the purchase of the railway and Pullman tickets by Diggs was an act purely voluntary on his part and was done by him gratuitously and upon his own responsibility, financially and otherwise, and not at the slightest

solicitation or suggestion of the defendant Caminetti, and without the slightest understanding or intimation that the defendant Caminetti was ever to repay him for his purchase of the railway ticket for Lola Norris. It must be quite evident, from a reading of the record in the case at bar, that there was not sufficient evidence to justify the instruction to the jury above referred to, nor to uphold the judgment of conviction on the first count.

Again, at the risk of repetition, we urge that the defendant was not on trial for a conspiracy with Diggs or anyone else to violate the "White-slave traffic Act". He was on trial for the doing of a *specific act* with a *specific purpose*, and the evidence, to support the verdict of guilty on the first count of the indictment, must show beyond all reasonable doubt that he committed some act, that he did something of a substantial, tangible character. Mere hyperboles of expression by prosecuting attorneys, mere rulings of a trial Judge, are not evidence. The defendant must have himself committed some act and he cannot be convicted because someone else committed the unlawful act charged against him but in which he did not participate.

We respectfully submit that there is no sufficient evidence of anything criminal done by the defendant Caminetti to support the judgment of conviction that he transported, or caused to be trans-

ported, or aided or assisted in transporting, in interstate commerce, Lola Norris, for any immoral purpose whatever.

We now advert, briefly, to the second point urged by us in this connection, which is that the evidence shows that the immoral purpose, if any was formed at all, was not formed in the State and Northern District of California, but was formed in the State of Nevada *after* the defendant and Lola Norris had crossed the boundary line between the States of California and Nevada.

As stated by the Supreme Court of the United States, in *Athanasaw v. United States*, 227 U. S. 326, 57 L. Ed. 528, in approving of the instructions of the trial Court in that case:

“ ‘The intent and purpose of the defendants *at the time* of the *furnishing* of this *transportation* for Agnes Couch is the *very gist and question* in this case’.”

This intent and purpose must, of course, have existed at the *time* of the *commission* of the *act* or *acts* by the defendant Caminetti, claimed by the prosecution to constitute a violation of the “White-slave traffic Act” under the first count of the indictment. There must, of course, be a joint union of act and intent, otherwise there is no offense. As stated, in the Supreme Court decision of *Athanasaw v. United States*, *supra*,

“ ‘The *intent and purpose* of the defendant’
* * * ‘*at the time* of the *furnishing* of this

*transportation' * * * is the very gist and question in the case'.*"

The evidence clearly shows two things: First, that the intent and purpose of the defendant was not the intent and purpose denounced by the "White-slave traffic Act" and alleged against him in the first count of the indictment, to wit: that Lola Norris should live with him as his concubine; second, that the immoral purpose, if any was formed at all, was not formed and did not exist at the *time* of the *furnishing* of the *transportation*, and in fact did not exist and was not formed until *after* the defendant and Lola Norris *had crossed the boundary line into the State of Nevada*.

The evidence clearly shows that the intent and purpose of the defendant Caminetti, and of Lola Norris herself, was to leave Sacramento to escape the impending notoriety, scandal and disgrace, bodily harm and probable arrest, which they both believed would happen to them if they remained in Sacramento.

The testimony of Lola Norris is conclusive on this point. She testifies:

"Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?"

The COURT. Q. Was it to get out of Sacramento or to get out of the state?

A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face

any disgrace that might come up; I don't remember that anything was said about getting out of the state. *The idea was to avoid any notoriety or scandal that might arise.*

Q. Without any particular place being mentioned?

A. No, sir." (Transcript of Record, p. 318.)

This intent and purpose was, manifestly, not an immoral one and was totally inconsistent and contrary to the intent and purpose alleged in the indictment.

How they should live after reaching Reno was not discussed or even considered by them, so far as the evidence discloses, until they had almost reached Reno, and certainly not until *after they had passed the boundary line between California and Nevada, and long after the furnishing of any transportation.* Assuming, which we deny, that the defendant did anything whatever to contribute to the furnishing of any transportation, the evidence in the record conclusively and irrefutably establishes the truth of what we here maintain. It was a most vital point in the case. It was the bone of a bitter contention between opposing counsel. For instance, Mr. Roche, in his opening argument to the jury, argued vigorously as follows:

"MR. ROCHE. They agreed *before they left the confines of the State of California and before the train reached Reno*, that they would take assumed names and would hire a bungalow at Reno.

MR. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will

find the testimony on pages 222-225 of the record. *That was after they crossed the state line.*

Mr. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the state line, and before the train passed from the confines of the State of California into the State of Nevada* these two men then agreed to take fictitious names, and that these two men at that time made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live." (Transcript of Record, pp. 416, 417.)

The evidence in the record, to which we will now advert, establishes that we were correct and that the prosecuting attorneys and the trial Judge were in error.

M. L. Jones, the conductor upon the Southern Pacific Company's train that transported Lola Norris, the defendant Caminetti, Marsha Warrington and Maury I. Diggs from Sacramento to Reno, testified:

"I recall that the train reached Reno on the morning of the 10th at 11:47. * * * The train passed over the state line about 10:40 or a little later probably." (Transcript of Record, p. 158.)

Marsha Warrington testified:

"I recall the time the train reached Reno. Before the train reached Reno and during sometime that morning, Mr. Diggs and Mr. Caminetti discussed the question of renting a house of some sort. *Mr. Diggs and Mr. Cami-*

netti, Miss Norris and myself were to live in this house. That discussion took place just before we got to Reno. Possibly half an hour before. After alighting from the train at Reno we went to—I don't know where it was, and had lunch. I think it was the Thomas Grill. The four of us had lunch. The train reached Reno around noon I think." (Transcript of Record, p. 250.)

If the first discussion, as to what these four persons were to do and how they were to live after their arrival at Reno, took place half an hour before the train reached Reno, then unquestionably the discussion was had about 11 o'clock that morning or fully one-half an hour after the train had passed over the state line, which was at 10:40 or perhaps a little later, as testified to by the conductor, Jones. Such being the case, and the evidence is incontestable on that point, then no offense violative of the "White-slave traffic Act" was committed at all, for the reason that there was no intent and purpose of concubinage until after passing the state line and when within 30 minutes arrival of Reno, at which time the discussion first arose as to what they were to do and how to live during their sojourn in Reno.

That this is the fact is accentuated by the testimony both of Marsha Warrington and of Lola Norris.

Miss Warrington testified as follows:

"Q. You did not use that language. Were you asked this question, reading from page 381 of Miss Warrington's testimony, of the previous trial, a question put by the Court: 'Q. He

is asking you whether Mr. Diggs said in his talks with you in any specific way that he wanted you to go there for the purpose of living with him?

A. No. He did not say that.' 'Was that question asked of you and did you make that answer?'

Mr. ROCHE. What page is that?

Mr. HOWE. Page 381.

The COURT. What is the object of this?

Mr. HOWE. I want to show why she went to Reno.

The COURT. She has not on this occasion testified that any specific suggestion of that kind was made.

Mr. HOWE. But I am asking her if any specific suggestion was made.

The COURT. You can ask her what they went to Reno for.

Mr. HOWE. Q. Was there any specific suggestion made by Mr. Diggs that you should go there for the purpose of living with him?

A. No. He said he would get a divorce and marry me. *Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him.*" (Transcript of Record, pp. 269, 270.)

At the very end of Marsha Warrington's examination, Mr. Roche asked the following question:

"Mr. ROCHE. I would like to ask just one question, with your Honor's permission.

Q. Miss Warrington, you were asked upon cross-examination what the specific intent was with which the four of you went to Reno. What conversation was there among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti as to what would be done by the four of you just as soon as you did reach Reno?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent and not redirect examination; it is a matter that they went into very thoroughly on their case in chief and she has already testified to.

The COURT. Well, I will let this one question be answered.

Mr. HOWE. We note an exception.

A. We were to live there until they secured their divorces, which would be in six months.

Mr. ROCHE. Q. Live where, and with whom?

A. Mr. Diggs and Mr. Caminetti." (Transcript of Record, p. 280.)

It will be observed that the prosecuting attorney shrewdly abstained from fixing the time and place of this conversation. However, the previous testimony of Marsha Warrington fixes it as a conversation had on the train which "took place *just before we got to Reno. Possibly half an hour before*". (Transcript of Record, p. 250.) As we have seen, at that time the train, on which they were, had passed over the state line and was in the State of Nevada.

We have already referred to her testimony, on cross-examination, where Marsha Warrington said:

"Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

And, on redirect examination, she stated:

"There was a conversation before we reached Reno, as to what names should be assumed by Diggs and Caminetti. They discussed different names that they might use and finally

decided on Ross and Enright." (Transcript of Record, p. 273.)

Lola Norris, in her direct examination, stated as follows:

"Mr. ROCHE. Q. Did he say anything as to what was to become of you in the event that you went away with him?

Mr. DEVLIN. Your honor, I object to that as being leading and suggestive and not asking her to give the conversation. It is suggesting to her the subject matter.

The COURT. No, he is simply calling for any statement that was made, he is not asking her to state as to any particular thing.

Mr. DEVLIN. We note an exception.

A. I don't remember just exactly what he did say about that.

Q. Was there anything said during those conversations as to any contemplated marriage between yourself and himself?

Mr. DEVLIN. I object to that. The witness has answered the question. It is a very leading question.

Mr. ROCHE. We have a right to call her attention to a particular subject matter now.

The COURT. The objection is overruled.

Mr. DEVLIN. We note an exception.

A. On the Saturday before we left—that was the day before, Mr. Caminetti said that his wife would start action for divorce he knew as soon as she found out that he was gone and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do." (Transcript of Record, n. 296.)

Again, Lola Norris stated on her direct examination:

“No, there was nothing said as to how we were going to live.” (Transcript of Record, p. 302.)

Lola Norris was then referring to the two hours' conference with Diggs and Marsha Warrington held on Sunday afternoon (March 9, 1913) at the Plaza in Sacramento, at which conference the defendant Caminetti was not present, and at which conference both Miss Norris and Miss Warrington, after listening to what Diggs had to say, determined to leave Sacramento.

Miss Norris, on cross-examination, testified as follows:

“Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody.” (Transcript of Record, pp. 309, 310.)

Miss Norris, on cross-examination, also stated as follows:

“I am acquainted with a lady named Mrs. Garrison. She is quite a friend of my mother's.

I remember her being present at my house about March 13th, two or three days after I came back from Reno, just before noon, at my residence, 1021 "P" Street, Sacramento, there being present my mother, myself and Mrs. Joe Garrison. We had a conversation there on various subjects. I possibly said something to the effect there, *'I don't see how any testimony I could give could hurt Drew in any way because he never did anything that I asked him not to do or that I didn't want him to do.'* Yes, I did say that; I still trusted Mr. Caminetti then, and I would not believe when my parents told me how he had deceived me. I would not believe them. I still trusted him. I did not have to have anybody tell me." (Transcript of Record, pp. 325, 326.)

It must be evident, from the above references to the testimony of the two young women, Marsha Warrington and Lola Norris, that the flight from Sacramento was not with the purpose alleged in the first count of the indictment, and that the first discussion, as to what the defendant Caminetti and Lola Norris should do upon their arrival at Reno and how they should live, was not had until they were almost upon the point of arriving at Reno and after they had passed the state boundary line. The incontestable evidence, above referred to, show these to be the facts. Under these incontestable facts, there was no violation of any of the provisions of the "White-slave traffic Act". The acts of the defendant Caminetti and of Lola Norris may have constituted violations of the penal laws of the States of California or of Nevada; he may have

rendered himself amenable to a state prosecution in California for deserting his wife and children, or in Nevada for immoral conduct, or for some violation of the California Juvenile Act. But under the evidence adduced in this record, he was certainly not guilty of having transported, or caused to be transported, or aided or assisted in transporting Lola Norris, in interstate commerce, *with the intent and purpose that she should become his concubine*. In the first place, he did nothing to transport, or cause to be transported, or aid or assist in transporting in interstate commerce, and in the second place, the specific intent, which is an inseparable concomitant of the offense of which he was convicted, did not exist at the time of the furnishing of any transportation, or when he left Sacramento with Lola Norris, and was not thereafter formed while the train, on which they were traveling, remained within the jurisdiction of the state and Northern District of California, and, in fact, was not formed, or even discussed, or considered, until they had almost reached Reno, and some considerable time after passing the state boundary line.

It is important to note, in this connection, that Lola Norris does not admit that she ever had had any sexual intercourse with the defendant Caminetti until after their arrival in Reno and during their occupancy of the bungalow at that place. (Transcript of Record, p. 307; also see pp. 290, 294, 306.) Although she admits passing the night,

upon several occasions, with the defendant, as shown by the testimony above referred to, and also claims that she, of her own volition, got into the upper berth with the defendant upon the trip from Sacramento to Reno, only "because the couch grew uncomfortable" (Transcript of Record, pp. 324, 325), nevertheless she stoutly maintained, throughout her entire testimony, that the very first occasion of any sexual intercourse, not alone with the defendant, but with *any* man, took place after their arrival at Reno and not before. If this state of facts is to be believed, and it comes from the lips of the prosecuting witness herself, it simply lends support to the overwhelming evidence in the case that the intent and purpose, not only of the defendant, but of Lola Norris, at the time of the furnishing of transportation, was to leave Sacramento because of the impending scandal and disgrace resulting from their indiscretions in associating with each other and with Maury I. Diggs and Marsha Warrington, although unaccompanied with any sexual intercourse on the part of the defendant and Lola Norris, and that the intent and purpose of the defendant was not, at the time of furnishing of transportation (assuming, which we deny, that he did anything to contribute to the furnishing of the transportation for Lola Norris), that Lola Norris should become his mistress or concubine.

At any rate, the testimony is uncontradicted that the intent and purpose to transport Lola Norris, so

that she might become the mistress or concubine of the defendant, was not discussed or considered by the defendant or Lola Norris, or by Maury I. Diggs or Marsha Warrington, until the parties had almost reached Reno, and *after* passing the boundary line dividing Nevada and California, when, for the first time, the rash consequences of their flight from Sacramento dawned upon them, and the question then arose, and was discussed, as to how they were to live, or what they were to do, upon alighting at Reno. This may seem a curious and remarkable state of affairs but it is the truth as established by the record.

An authority applicable to the question under discussion is *People v. Black*, 147 Cal. 426. In that case, it was held that the *gist* of the offense of child-stealing consists of the taking and enticing away of a minor child with the intent both to detain and to conceal such child from the person having legal charge of it, and if either intent is lacking the offense is not made out.

It was further held that where all of the evidence is in the record, and is without conflict, and wholly fails to show any intent of the defendant both to detain and to conceal the child, or any evil intent, a question of law is presented, and a reversal will be ordered for insufficiency of the evidence to sustain the verdict.

The Supreme Court of California used the following language:

“The matter of intent, both as to detention and concealment, is made a question of fact under the provision of the section, and this question of fact is to be proven like any other fact, from the acts and conduct of the parties, considered in connection with all the other circumstances in the case. And while it is the peculiar province of a jury to find upon the fact of intent, and their finding thereon is generally conclusive, yet this conclusiveness exists only when the evidence bearing upon intent (when intent is made a question of fact) is such that the jury were warranted in reasonably inferring therefrom the existence of the particular intent made necessary by the law to be found by them in order to support their verdict. This is true when the evidence, even though meagre, is yet sufficient, if believed by the jury, to support their finding, and is always true when sufficient but conflicting evidence is presented upon the subject.

When, however, there is no conflict, and all the evidence which was before the jury, and from which they found upon the matter of intent, is before this Court, there is then presented a question of law whether such evidence was sufficient to sustain the finding of a specific intent, which the law requires shall exist in order to constitute an offense. This is the question presented here: whether the evidence which is undisputed was sufficient to warrant the jury in their finding (essential to support the verdict against defendant) that the girl Dottie was taken and enticed away by him with intent to detain her from her mother.”

So, in the case at bar, we maintain that, as all of the evidence which was before the jury, from which they found upon the matter of intent, is

before this appellate tribunal, there is presented a question of law whether such evidence was sufficient to sustain the finding of a specific intent, which the law requires shall exist in order to constitute an offense.

We contend that the uncontradicted evidence shows that the intent and purpose in leaving Sacramento for Reno was flight to avoid impending disgrace, exposure, scandal, notoriety, bodily harm and probable arrest; an intent and purpose totally inconsistent with the intent and purpose denounced by the "White-slave traffic Act" and alleged in the indictment.

Furthermore, in this connection, we contend, that the uncontradicted evidence shows that the intent and purpose, if any immoral intent and purpose existed, was not formed until after the defendant had left the confines of the state and Northern District of California, where the indictment charges the offense to have been committed, and was not actually formed, according to the testimony of Marsha Warrington herself, until they had almost reached Reno and a considerable time after they had passed the boundary line dividing California from Nevada.

Inasmuch as the uncontradicted evidence discloses all these to be the facts, we respectfully submit that a question of law is presented by the record as to the existence of the specific intent required by the "White-slave traffic Act", and that

this all-important question should be resolved in favor of the defendant.

The trial Judge instructed the jury on the question of intent, among other things: "It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent *at the initiation of any such act.*" (Transcript of Record, pp. 431, 432.)

The "initiation" of any act of transportation, assuming, which we deny, that anything was done by the defendant in the nature of any act of transportation, took place at Sacramento, and yet the evidence is uncontradicted and irrefutable that the intent alleged in the indictment was not formed at Sacramento and did not come into existence until the defendant and Lola Norris had almost reached Reno and certainly not until after crossing the state boundary line.

One of two things results from this instruction. Either the trial Judge ignored the evidence, showing irrefutably that no intent and purpose, as alleged in the indictment, was formed or came into existence until after the defendant and Lola Norris had passed beyond the State and Northern District of California, in passing upon the motion to instruct the jury to acquit and subsequently in denying the motion in arrest of judgment; or the jury ignored the trial Judge's instruction on this subject.

Without further elaborating upon the assignments of error urged in this connection, we sub-

mit that, in view of the uncontradicted evidence in the case, the trial Judge should have granted the motion to instruct the jury to acquit on the ground of the insufficiency of the evidence to justify submitting the case to the jury, or should thereafter certainly have granted the motion in arrest of judgment.

The argument heretofore advanced as to the refusal of the trial Judge to grant the motion to acquit, or the motion in arrest of judgment, applies equally to the several exceptions taken to the refusal of the Court to strike out the testimony of each and every witness who testified. Such motions were based upon the ground that the testimony of none of the witnesses, either singly or collectively, was sufficient, in law, to justify a verdict against the defendant. In this connection, we refer to the following assignments of error: No. 19, Transcript of Record, pp. 49, 155, 156; No. 21, Transcript of Record, pp. 49, 159; No. 29, Transcript of Record, pp. 52, 176; No. 31, Transcript of Record, pp. 53, 176; No. 37, Transcript of Record, pp. 55, 192, 193.

The following colloquy between the Court and one of the counsel for defendant will disclose the purpose of the motions to strike out and the fact that none of the defendant's rights in that respect were lost:

“Mr. WOODWORTH. Now, if your Honor please, we make a similar motion to strike out the testimony of the witness (F. J. Peck), on

the ground that no foundation for the same has been laid, there is no proof of the *corpus delicti*, that it is immaterial, irrelevant and incompetent, and all the objections I previously urged.

The COURT. Mr. Woodworth, that seems an idle thing to make a suggestion of that kind. This is a part of the proof of the *corpus delicti*, as you term it, it is a part of the proof of the offense. They cannot prove it all with one witness. If the motions you have made with reference to the testimony of these witnesses were to be entertained no case in the world could be proven because the case must be proven piece-meal and by the testimony of different witnesses.

Mr. WOODWORTH. But finally, when the case is concluded, when the Government has concluded its case, and it has not proved all of the elements of this offense, then according to well established rule of law if we had not made these motions it may be urged that counsel is in default, and I would rather err on the side of an abundance of precaution than on the other side.

The COURT. But you are entirely in error as to the necessity of making these motions from time to time during the making of the case by the other side. You are entitled to wait until such a case as they have is made and then you may make the motion that the evidence be stricken out upon the ground that it is not connected with the defendant.

Mr. WOODWORTH. Very well, then. I will make the motion then.

Mr. ROCHE. And of course then, may it please the Court, if it is not connected up your Honor would advise the jury to acquit the defendant.

The COURT. Certainly. That is the way that thing would be met. But to make these motions with reference to separate and indi-

vidual witnesses whose testimony goes to make up the whole is idle.

Mr. WOODWORTH. Very well, I will observe your Honor's direction." (Transcript of Record, pp. 192, 193.)

We submit, if the motions to strike out the testimony of each witness, as he testified, were not proper, that the trial Judge should have granted the motion to instruct the jury to acquit, or thereafter the motion in arrest of judgment on the ground that there was not sufficient evidence, in law, to uphold the verdict and judgment of conviction on the first count of the indictment.

But even if the trial Judge did not feel justified in granting the motion to acquit, we respectfully submit that he should, at the very least, have given some of the following instructions requested on behalf of the defendant:

"You are further instructed that, in the first count of the indictment, the defendant is charged with having wilfully, knowingly and feloniously unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, a certain girl, to wit, one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the mistress of the said defendant.

You are instructed, under this first count of the indictment, that before you will be authorized or justified in convicting the defendant, you must first be satisfied to your entire sat-

isfaction and beyond all reasonable doubt that the defendant did some act of a material, substantial character by virtue of which, the said Lola Norris was transported or caused to be transported, or aided or assisted in obtaining transportation for, and in transporting her in interstate commerce; And in this connection, I charge you that the act of transportation, or of causing to be transported or aiding or assisting in obtaining transportation, must have been some such act as that which led to the purchase of tickets, or furnishing the means with which to purchase tickets, or some such act resulting in the transportation, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did commit some substantial material act resulting in the transportation of Lola Norris for the purpose alleged in the indictment and with which the intent denounced by the law and alleged in the indictment, it will be your sworn duty to acquit him." (Transcript of Record, pp. 115, 116, 464; Assignment of Error, No. 189.)

"You are further instructed that it is not sufficient for the prosecution to show to your entire satisfaction and beyond all reasonable doubt, that the defendant was present, if you should find that he was present, at the time that the tickets were purchased by Maury I. Diggs, or that he knew that said tickets had been purchased by Maury I. Diggs, but it is incumbent on the prosecution to prove to your entire satisfaction and beyond all reasonable doubt that the defendant not only was present at the time the tickets were purchased by Maury I. Diggs and that he knew the purpose for which the tickets were purchased by said Maury I. Diggs, but it must prove, as alleged in the first and second counts of said indictment, that said defendant did some act of a

material, substantial nature in transporting or causing to be transported, or in aiding or assisting in obtaining transportation for Lola Norris and Marsha Warrington, or either of them, in interstate commerce for the specific purpose of debauchery and for the immoral purpose alleged in the indictment, and unless you shall so find beyond all reasonable doubt, it will be your duty to acquit the defendant.” (Transcript of Record, pp. 116, 117, 465; Assignment of Error, No. 190.)

“You are hereby further instructed that if you are satisfied from all of the evidence presented in the case that the intent and purpose of the defendant in going from Sacramento to Reno was to avoid scandal and notoriety and was not for the purpose alleged in the four counts of the indictment namely, a purpose of debauchery and for an immoral purpose in that Lola Norris and Marsha Warrington should become the concubines and mistresses of the defendant and Maury I. Diggs respectively, or if you have a reasonable doubt, after considering all the evidence in the case, as to the real purpose and intent of the defendant in going from Sacramento to Reno, or as to the real purpose and intent of the defendant, in doing any of the acts charged against him in the indictment then it is your sworn duty to acquit the defendant.” (Transcript of Record, pp. 117, 465, 466; Assignment of Error, No. 191.)

“You are further instructed that the mere presence or the mere knowledge of the defendant of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, and with which this defendant is also charged in a separate indictment, is not sufficient to warrant his conviction or to justify you in finding him guilty.

You must be satisfied, beyond all reasonable doubt, not only that he was present or had

knowledge of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, but you must be further satisfied, beyond all reasonable doubt, that he then and there knew that the specific intent and purpose of said Maury I. Diggs in committing the offenses claimed by the prosecution to have been committed by said Maury I. Diggs was the specific purpose and intent denounced by the White Slave Traffic Act, to wit, for the purpose of debauchery and for an immoral purpose as alleged in the indictment.

Moreover, you must further be satisfied, beyond all reasonable doubt, not only that the defendant had the knowledge of the intent and purpose of said Maury I. Diggs in committing offenses claimed by the prosecution to have been committed by said Maury I. Diggs and in which it is claimed by the prosecution the defendant wilfully and knowingly participated, but you must further be satisfied, beyond all reasonable doubt, that the defendant, having such knowledge, just referred to, did aid, or abet, or counsel, or command, or induce, or procure the commission of the offenses claimed by the prosecution to have been committed by said Maury I. Diggs, and if you have any reasonable doubt as to any of the matters just referred to, it is your sworn duty to give the defendant the benefit of that doubt and acquit him." (Transcript of Record, pp. 117, 118, 466, 467; Assignment of Error, No. 192.)

"The Court instructs you that it is not a crime under the laws of the United States for the defendant to have performed the acts set forth in the indictment, if the same were wholly committed in the State of California, nor would the same be a crime, by the laws of the United States, under the allegations of the indictment, unless the defendant used a common carrier engaged in business of transporting and carrying passengers in interstate

commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant. If you do not find from all the evidence that the defendant used a common carrier engaged in the business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant, it will be your duty to find the defendant not guilty." (Transcript of Record, pp. 111, 460; Assignment of Error, No. 181.)

"You are hereby further instructed that the specific intent denounced by the statute, known as the White Slave Traffic Act, and alleged in the indictment must have existed at Sacramento, State and Northern District of California, the place where the offenses are alleged to have been committed, or at least within the State and Northern District of California, and must have existed at the time the alleged violations of the statute in question are charged to have been committed, and if it should appear from the evidence that the specific intent and purpose denounced by the White Slave Traffic Act and alleged in the indictment was not formed and did not exist until after the parties transported had passed the boundary line dividing California from Nevada, then it is your duty to acquit this defendant, as the intent must have existed at the time of the commission of the acts complained of, which are charged in the indictment to have been committed in Sacramento, State and Northern District of California." (Transcript of Record, pp. 120, 468; Assignment of Error, No. 196.)

These requested instructions and the failure of the trial Judge to give them, are again referred to under subsequent subdivisions of this opening brief.

VI.

The Prosecuting Attorneys Committed Reversible Errors In Making Improper Comments and Arguments to the Jury, and the Trial Judge Likewise Fell Into Error In Permitting the Prosecuting Attorneys to Make Improper Comments and Arguments to the Jury, and In Not Checking or Reproving Them at the Time, but on the Contrary, In Approving and Endorsing the Improper Comments and Arguments.

At the very outset of his opening argument, Mr. Roche made the following highly improper and unfair statement to the jury:

“MR. ROCHE. ‘Mr. Woodworth would not state to you that he proposed to establish the defendant’s innocence; the strongest he would go was that he would create a reasonable doubt.’

MR. WOODWORTH. We take an exception to the remarks of counsel; that is not the position taken here.

THE COURT. I cannot recall definitely the opening statement.

MR. ROCHE. The last remark that Mr. Woodworth made in his opening statement, and the record will sustain my position, was that he expected to create a reasonable doubt in the minds of the jury as to the guilt of this defendant.

THE COURT. I recall that he used that, but I don’t think that he stopped at saying that he would raise merely a reasonable doubt.

MR. WOODWORTH. Why, no, of course not. That is absurd.” (Transcript of Record, pp. 82, 414; Assignment of Error No. 124.)

Mr. Woodworth, as well as his associates, throughout the entire trial of the case, as the Transcript of Record shows, vigorously, steadfastly and insistently proclaimed and advocated the innocence of the defendant Caminetti from any knowing, wilful or felonious infraction of the "White slave traffic Act". A mere reading of Mr. Woodworth's opening statement to the Court and jury, as disclosed on pages 357-362 of the Transcript of Record, affords of itself ample refutation of the suggestion, gratuitously thrown out by the able and astute prosecuting attorney, that Mr. Woodworth "would *not state to you* that he proposed to establish the defendant's innocence; the *strongest he would go* was that he would create *a reasonable doubt.*"

At the conclusion of an opening address occupying some considerable time, Mr. Woodworth concluded:

"And, gentlemen of the jury, *having established that*, or having raised a reasonable doubt in your minds as to the real intent and purpose of the defendant in leaving Sacramento in view of all the surrounding circumstances, *we will ask you to give him the benefit of that doubt, and acquit him.*" (Transcript of Record, p. 362.)

The expression used by Mr. Woodworth, "*having established that*", obviously had reference to the previous statements made by him, in which he had detailed to the jury the proofs to be adduced

on the part of the defendant, showing his innocence.

It was highly improper and unfair for the prosecuting attorney to seize upon this one isolated statement of Mr. Woodworth, viz: "or having raised a reasonable doubt, etc., etc.", as being tantamount to an admission that "Mr. Woodworth would not state to you that he proposed to establish the defendant's innocence; the strongest he would go was that he would create a reasonable doubt".

The concluding remarks of Mr. Woodworth were, of course, to be considered in connection with his previous statements and address as an entirety. He simply told the jury that, having established what he stated he proposed to prove on behalf of the defendant, he would ask them *to acquit* the defendant, and he coupled that statement with the further one that if there was a reasonable doubt in the minds of the jury as to the real intent and purpose of the defendant in leaving Sacramento, it should give him the benefit of that doubt. This statement was perfectly proper. It is the well settled law. The defendant was entitled to the presumption of innocence. The burden of proof was upon the prosecution. This burden never shifts in a criminal case. If there was any reasonable doubt as to the intent and purpose of the defendant in leaving Sacramento, the jury, under the law, was compelled to give the defendant the benefit of that doubt. The "intent and purpose" *at the time* of

the *furnishing* of the *transportation*, was the "very gist and question" in the case.

Athanasaw v. U. S., 227 U. S. 326.

What Mr. Woodworth asked the jury to do was perfectly legitimate and proper, and in keeping with his duty and obligation as an attorney defending one accused of crime. The prosecuting attorney had no right to distort the meaning of what Mr. Woodworth had stated or to endeavor to impress the jury with the idea that Mr. Woodworth had practically admitted his client's guilt and only expected to create a reasonable doubt in the case. His conduct in that respect was eminently unfair and highly improper, and was prejudicial to the defendant's substantial right to a fair and impartial trial.

Hall v. U. S., 150 U. S. 76; 37 L. Ed. 1003;

Williams v. U. S., 168 U. S. 382; 42 L. Ed. 509.

We also contend that the following remarks made by Mr. Roche, in his opening argument on behalf of the prosecution, to which exceptions were taken, were also highly improper and prejudicial to the defendant:

"MR. ROCHE. He hides himself behind the respectability of a loyal wife.

MR. WOODWORTH. That is inflammatory and not based on any facts.

THE COURT. *Counsel must have some latitude. Proceed.*" (Transcript of Record, pp. 84, 414; Assignment of Error No. 126.)

* * * * *

"Mr. ROCHE. He deserted and abandoned his family and left them without a dollar because on the date that he did abandon them he assigned to some third party every dollar due him from the Board of Control.

Mr. WOODWORTH. We take an exception to the remarks of counsel as being highly inflammatory.

The COURT. *Whenever counsel transgresses what I deem proper comments on the evidence I will stop him.*" (Transcript of Record, pp. 83, 414, 415; Assignment of Error No. 125.)

* * * * *

"Mr. ROCHE. It is the duty of every juror to carry out the law as given to him by the Court. *If he don't do that innocent men may be convicted or guilty men go unwhipped of justice.*

Mr. WOODWORTH. We object to the remarks of counsel, speaking about the duties of jurors and the law. Your honor has repeatedly told me that I could not refer to the law of the case.

The COURT. *He is not discussing the law.*

Mr. WOODWORTH. He is not discussing the facts of the case. We take an exception.

The COURT. Proceed." (Transcript of Record, pp. 84, 415; Assignment of Error No. 127.)

* * * * *

"Mr. ROCHE. *The people of these United States are watching this case and waiting to ascertain whether upon such a record as has been made here, under the law of this case, as it will be given to you by the Court, this defendant shall go unwhipped of justice.*

Mr. WOODWORTH. We object to any such statement, that the people of these United States are looking upon this case as inflammatory and intended to move the jury by passion. We except to such remarks.

The COURT. *Avoid any reference to anything not in evidence. It is a mere figure of speech, a mere reference to one of those things which counsel frequently call in as an aid to argument. It is very difficult to regulate those things.*" (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

* * * * *

"Mr. ROCHE. The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your Government as well as my Government, the Government of all of us, *demands that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California.*

Mr. WOODWORTH. Another exception to those remarks." (Transcript of Record, pp. 90, 419, 420; Assignment of Error No. 139.)

* * * * *

"Mr. ROCHE. On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this.

Mr. WOODWORTH. We note an exception to that." (Transcript of Record, pp. 90, 420; Assignment of Error No. 140.)

We submit that these remarks were entirely too inflammatory and were, confessedly, employed to influence and sway the jurors by passion. They were not justified by any testimony in the case;

especially when the evidence against the defendant was as meagre as it was in the case at bar.

People v. Hail, Vol. 19, Cal. App. Dec. 298,
309 et seq., and many cases there cited;

Wells v. State, 145 S. W. 950;

Wilson v. State, 128 N. W. 38;

People v. Crosby, 17 Cal. App. 518;

People v. Burke, 145 Pac. 950;

Collins v. State, 145 S. W. 1065;

Collins v. State, 56 So. 527;

Parker v. State, 75 So. 437;

Com. v. Nicely, 130 Pa. 261; 18 Atl. 737;

Watson v. State, 7 Okl. Cr. 590; 124 Pac.
1101;

Williams v. U. S., 168 U. S. 382;

Hall v. U. S., 150 U. S. 76;

Graves v. U. S., 150 U. S. 118;

People v. Warr, 136 Pac. 304;

Brailaford v. State, 158 S. W. 541;

Miller v. State, 69 S. E. 922;

Territory v. Cordova, 11 N. M. 367; 68
Pac. 919;

State v. Blackman, 108 La. Ann. 121; 32
So. 334;

People v. Bissert, 172 N. W. 634;

Ward v. State, 77 Ark. 19; 90 S. W. 619;

Ivey v. State, 54 L. R. A. 459;

State v. Proctor, 86 Iowa 699.

The following highly improper comments and remarks were made by Mr. Matt I. Sullivan, during his closing argument in behalf of the prosecution:

“MR. SULLIVAN. *If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth your verdict in this case on each and every count must be guilty.*

MR. WOODWORTH. We take an exception, if your Honor please. We except to the language of counsel upon the ground it is inflammatory, that it is not proper coming from the prosecuting attorney.

THE COURT. *Mr. Woodworth, I would not interrupt unless there was some reasonable ground for it. Counsel have proper limitations in their arguments.*

MR. WOODWORTH. I did feel that it was my duty to object, may it please your Honor, I did think I had reasonable ground and still think so.” (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

* * * *

“MR. SULLIVAN. Now, is there one among you that upon his oath can say that the defendant did not aid and assist in the transportation of Lola Norris from Sacramento to Reno for an immoral purpose? If you believe that his purpose was immoral, that his purpose was to live with Lola Norris in Reno, *there is not one man among the twelve of you who has regard for the laws of the country or regard for his oath, I take it—*

MR. WOODWORTH. We certainly except to that.

THE COURT. Read the record. (Record repeated by the reporter.)

MR. SULLIVAN (continuing). *Can render a verdict of not guilty.*” (Transcript of Record, pp. 93, 94, 423; Assignment of Error No. 145.)

* * * *

We submit that these remarks were also entirely too inflammatory, and were, obviously, employed to influence and sway the jurors by passion. They were not justified by any evidence in the case. The alleged "victim", Lola Norris, herself exonerates the defendant Caminetti from any immoral or lascivious purpose in leaving Sacramento. We again quote her testimony:

She further testified:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

Marsha Warrington testified:

"Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

Inasmuch as the question of the intent and purpose of the defendant in leaving Sacramento with Lola Norris was one of the vital points in the case,

it is submitted that the testimony of the prosecuting witness herself did not justify the harsh, severe and ~~a~~scerbitous language of the prosecuting attorneys, and that the use of such invective could have had no result other than to inflame the minds of the jury and to move them to render a verdict against the defendant from passion and prejudice.

It would prolong to an unpardonable length this already, we fear, too voluminous brief, to refer in detail to the very many authorities, both in the federal and state Courts, holding that remarks of prosecuting officers, similar to those employed in the case at bar, constitute misconduct and reversible error, and that the action of the trial Judge, in not checking or reproving the prosecuting officers and in not instructing the jury to disregard the improper remarks and arguments, is equally reprehensible and erroneous. We content ourselves by referring to but a few of the leading authorities on this subject.

In the well considered case of *People v. Hail*, Vol. 19 Cal. App. Dec. 298, 309 et seq., where quite a number of authorities are considered, it appeared that, in the course of his argument to the jury, the district attorney said:

“Men have been acquitted who have committed cold blooded murder, and *if you were to acquit this man under the testimony here* you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go *unwhipt of justice*; gentlemen, you cannot do it, you will not do it. *Should you do*

it you would be afraid to go out on the street and meet your fellow-men."

These remarks of the prosecuting attorney, in the case cited, are upon a par with the remarks of the prosecuting attorneys in the case at bar, both in their opening and closing arguments, as above set forth in this Opening Brief. They have but to be compared to appreciate their substantial similarity, especially those portions italicized by us in the preceding pages of this Opening Brief.

The trial Court, in the case cited, refused or omitted to check or reprove the prosecuting attorney, or to instruct the jury to disregard the remarks, saying: "I don't understand it; to me it doesn't mean anything; *Proceed.*" (Vol. 19 Cal. App. Dec. p. 309.)

The trial Judge, in the case at bar, not only refused to check or reprove the prosecuting attorneys in their objectionable remarks to the jury, both in their opening and closing arguments, or in instructing the jury to disregard the remarks, but, on the contrary, approved of them, stating on one occasion, when exception was taken to the remarks of the prosecuting attorneys as being highly inflammatory:

"Whenever counsel transgresses what I deem proper comments on the evidence I will stop him." (Transcript of Record, pp. 83, 414, 415; Assignment of Error No. 125.)

Again, on another occasion, stating, in reply to a protest of counsel for the defendant:

“Counsel must have some latitude, *Proceed.*” (Transcript of Record, pp. 84, 414; Assignment of Error No. 126.)

Again, over the remonstrance of counsel for defendant that:

“We object to the remark of counsel, speaking about the duties of jurors and the law. Your Honor has repeatedly told me that I could not refer to the law of the case”, the trial Judge answered: “He is not discussing the law. * * * *Proceed.*” (Transcript of Record, pp. 84, 415; Assignment of Error No. 127.)

Again, upon another occasion when counsel for defendant strenuously objected to the remarks of the prosecuting attorney, in his opening argument, wherein he had said:

“The people of these United States are watching this case and waiting to ascertain whether upon such a record as has been made here, under the law of this case, as it will be given to you by the court, this defendant shall go unwhipped of justice,” the trial Judge contented himself by saying: “Avoid any reference to anything not in evidence. *It is a mere figure of speech, mere reference to one of those things which counsel frequently call in as an aid to argument. It is very difficult to regulate those things.*” (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

Again, upon another occasion when one of the prosecuting attorneys was making his closing argument, in which he said, among other things:

“If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth, your verdict in this case on each and every count must be guilty”, to which language one of the attorneys for the defendant took exception in the following words: “We take an exception, if your Honor please. We except to the language of counsel upon the ground it is inflammatory, that it is not proper coming from the prosecuting attorney”, the trial Judge replied. “Mr. Woodworth, I would not interrupt unless there was some reasonable ground for it. Counsel have proper limitations in their arguments.” (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

These excerpts will show the applicability, to the case at bar, of the language of the District Court of Appeal of California in the case cited of *People v. Hail*, *supra*. That Court said:

“That the effect of the statement that the jurors, in the event that they acquitted the defendant, would be afraid to go out upon the public streets and meet their fellowmen, *was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence*, cannot for a moment be doubted. *Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained.* In a case where evidence of guilt was overwhelming or

conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case." (19 Cal. App. Dec. p. 310; italics ours.)

So, in the case at bar, the language of the prosecuting attorneys was calculated "to intimidate or influence them (the jury) to return a verdict of conviction, regardless of their views as to the effect of the evidence". It matters not, as pointed out by the District Court of Appeal, in the passage just quoted, that the "language referred to was used in good faith or for the purpose of influencing a verdict". Furthermore, as stated by the District Court of Appeal, in the passage just quoted, the language employed is much more reprehensible in a case where the evidence, as in the case at bar, is very meagre, than in a case where evidence of guilt is overwhelming or conclusive.

The District Court of Appeal, in the case of *People v. Hail*, *supra*, further says:

"The language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow-citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty"

(3) A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed, any lawyer should, in his address to a jury, *remain strictly within the record and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.*
* * *

The cases are replete with severe arraignments of prosecuting officers for unfairness in the presentation of cases against persons accused of crime, and there have been very justly recorded many reversals for misconduct no more obnoxious than that complained of in the case at bar. The number of such cases is so large that it would greatly extend the length of this opinion—now more extended than had been desired—to attempt to notice all of them. We shall examine a few of them, however.” (19 Cal. App., pp. 310, 311.) (Italics ours.)

The District Court of Appeal then proceeds to consider and to quote liberally from the following authorities:

People v. Bowers, 79 Cal. 415;

People v. Ah Lean, 92 Cal. 282;

Tucker v. Henniker, 41 N. H. 319;

People v. Mull, 60 N. E. 629;

which are also applicable to the case at bar and support the contentions we make in this regard.

The District Court of Appeal then proceeds and concludes as follows:

“Thus we have presented excerpts from a few of the cases upon the proposition under review, not for the reason that it is not clear in principle that reversals should be ordered where public prosecutors resort to the practice of bringing into their cases *under the guise of argument or otherwise matters wholly outside the records and which are obviously calculated to influence juries, either consciously or unconsciously, in arriving at verdicts of guilty, contrary to the evidence and the law*, but to show how such practice is uniformly condemned in strong language by the higher courts.

There are innumerable other cases in which similar views are expressed and like conclusions reached, and the practice referred to severely and justly condemned. It is not necessary here to review those cases, but among them the following will be found to be cogently applicable to the case at bar and instructive upon the question in hand: People v. Fielding, 158 N. Y. 542, 53 N. E. 496; People v. Butler, 8 Cal. 463; Vickers v. United States, 98 Pac. 467, 473; State v. Kauffman, 118 N. W. 337; State v. Underwood, 77 N. C. 502; State v. Robert, 131 Mo. 328; People v. Devine, 95 Cal. 231; People v. Chew Bock Hue, 18 Cal. App. Dec. 634; People v. Fleming, 166 Cal. 357; People v. Tufts, 47 Cal. Dec. 277.

Our conclusion is that, with the defendant's guilt *very doubtful under the evidence, the remarks of the district attorney above quoted*

were most damaging to the legal rights of the accused, that thereby he was deprived of a fair and impartial trial, and that the result reached by the jury, if permitted to stand under the circumstances, would involve a miscarriage of justice.

The judgment and order are reversed and the cause remanded." (Italics ours.)

In the case of *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101, it appeared that the district attorney, in his closing argument to the jury, used the following language:

"He (defendant) is guilty of murder and he ought to suffer for it. *The people in this courtroom are here DEMANDING that justice be meted out to this defendant and I know that you will do it when you retire to deliberate upon your verdict in the jury room.*"

The Court, in reversing the conviction, quoted the following language from *Cox v. State*, 2 Okl. Cr. 668:

"The authorities are numerous as to what constitutes improper conduct. They are uniform in holding any statement improper that is calculated to inflame the minds of the jurors, arouse their prejudice or appeal to their passions."

This decision, and that of *People v. Hail*, *supra*, are peculiarly applicable to the remarks of the prosecuting attorneys in the case at bar, when they said:

"MR. ROCHE. *The people of these United States are WATCHING this case and waiting to ascertain whether upon such a record as has*

been made here, under the law of this case, as it will be given to you by the Court, this defendant shall go unwhipped of justice." (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

And, again when they said:

"Mr. ROCHE. The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your government as well as my government, the government of all of us, DEMANDS that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California." (Transcript of Record, pp. 90, 419, 420; Assignment of Error No. 139.)

And again when they said:

"Mr. ROCHE. On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this." (Transcript of Record, pp. 90, 420; Assignment of Error No. 420.)

And again when they said:

"Mr. SULLIVAN. If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth, your verdict in this case on each and every count must be guilty." (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

And again when they said:

“Mr. SULLIVAN. Now, is there one among you that upon his oath can say that the defendant did not aid and assist in the transportation of Lola Norris from Sacramento to Reno for an immoral purpose? If you believe that his purpose was immoral, that his purpose was to live with Lola Norris, there is *not one man among the twelve of you who has regard for the laws of the country or regard for his oath, I take it, can render a verdict of not guilty.*” (Transcript of Record, pp. 93, 94, 423; Assignment of Error No. 145.)

In the case of *Collins v. State*, 148 S. W. 1065, the prosecuting officer, in his argument to the jury, where the defendant was charged with an assault with an intent to commit rape, said: “If you don’t convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to commit rape in your county.” These remarks were considered improper but unavailing to defendant for reversal, in view of the trial Court’s instruction to the jury that they were improper and to disregard them.

In *Com. v. Nicely*, 130 Pa. 261, 18 Atl. 737, the Supreme Court of Pennsylvania said, in commenting upon the duty of a prosecuting officer:

“He should act impartially. He should present the commonwealth case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appeal to their preju-

dices he is no longer an impartial officer, but becomes a heated partisan."

In the case of *Williams v. U. S.*, 168 U. S. 382, on the trial of an immigration inspector for extortion, the prosecuting officer remarked in the presence of the jury, that, "No doubt every Chinese woman who did not pay defendant was sent back" (to China). The overruling of defendant's objection to the remark was held to be error and the case was reversed on this, among other, grounds.

In the case of *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919, a statement employed by the prosecutor in addressing the jury: "The verdict of the people and the community is that the defendant is guilty", was held to be an improper and prejudicial expression, demanding a rebuke from the trial Court.

In the case of *State v. Blackman*, 108 La. 121 Ann., 32 So. 334, the statement made by the prosecuting attorney in his closing argument:

"If there is a man on the jury who does not believe this man ought to be hung, then he is unfit to sit on the jury,"

was held to be prejudicial misconduct and cause for reversal.

We refer to another comment of the prosecuting attorney, in his opening argument, to which exception was taken and which we believe to have been highly improper. It is as follows:

"MR. ROCHE. It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case.

Mr. WOODWORTH. We object to any reference to the Diggs case.

The COURT. Yes, the evidence that was before the jury in the Diggs case is not here.

Mr. ROCHE. That is true, but the fact that some of these witnesses testified in the other trial has been made apparent by some of the witnesses here. I do not propose to refer to that testimony, however.

Mr. WOODWORTH. We take an exception.” (Transcript of Record, pp. 88, 418; Assignment of Error No. 134.)

The fact was notorious, and was known to the jurors, that Maury I. Diggs had just previously been convicted upon a similar charge. The trial Judge permitted the introduction of a great deal of evidence as to the acts and conduct of Maury I. Diggs and Marsha Warrington, with which the defendant Caminetti had nothing whatsoever to do, upon the theory that the accusation against the defendant Caminetti was akin to a conspiracy and that therefore the act or statement of one confederate was admissible against the other. To this theory, in permitting of the introduction of much evidence which, we believe, to have been very damaging to the defendant Caminetti, we objected vigorously and continuously, but our objections were overruled. We do not think the prosecuting attorney should have made the remarks above referred to, calling the attention of the jury to the Diggs case and telling them that “it is difficult for me to distinguish all of the evi-

dence in this case from all the evidence in the Diggs case”.

Other highly improper and prejudicial remarks were as follows:

“Mr. ROCHE. The defendant was not too agitated or frightened to request Maury I. Diggs and Marsha Warrington to go into the lower berth and to request Lola Norris to get into the upper berth.

Mr. WOODWORTH. There is no evidence that the defendant requested Maury I. Diggs to get into the lower berth. We take an exception to that.

The COURT. *Proceed. That is an inference that the jury may draw from the evidence, if they see fit.*” (Transcript of Record, pp. 88, 418; Assignment of Error No. 135.)

This statement, on the part of Mr. Roche, was not supported by the evidence and, in fact, was directly contrary to the evidence. The defendant Caminetti at no time requested Maury I. Diggs and Marsha Warrington to go into the lower berth, nor did he request Lola Norris to get into the upper berth with him. The uncontradicted testimony is as follows on this point:

“Mr. Diggs and Miss Warrington occupied the lower berth and I lay on the couch for about half an hour and then Mr. Caminetti and I occupied the upper berth. I don’t know whether Mr. Diggs took off any of his clothing before he got into the berth. I think he did. Mr. Caminetti took off his coat; I don’t remember anything else. We remained in those berths all night.” (Testimony of Lola Norris on her direct examination, Transcript of Record, pp. 305, 306.)

There is not the slightest intimation, in the above testimony, that the defendant at any time requested Maury I. Diggs and Marsha Warrington to go into the lower berth or Lola Norris to get into the upper berth with him. On cross-examination, Lola Norris testified as follows:

“When we got on the train at Sacramento Mr. Diggs and Miss Warrington got into the lower berth and I got on the couch. I stayed on the couch about half an hour. It was made up when I got on the couch. In the meantime Mr. Caminetti was in the upper berth. I stayed on the couch about half an hour and then got in the upper berth *because the couch grew uncomfortable.*” (Transcript of Record, pp. 324, 325.)

Certainly, the above testimony did not justify the prosecuting attorney in making the rash and prejudicial statement, in his opening argument to the jury, that

“The defendant was not too agitated or frightened to request Maury I. Diggs and Marsha Warrington to go into the lower berth and to request Lola Norris to get into the upper berth.”

An examination of the testimony of Marsha Warrington also conclusively shows that the prosecuting attorney was not warranted, by anything in the testimony, in making the remarks objected to and approved by the trial Judge. Marsha Warrington testified, on her direct examination:

“Mr. Diggs paid for the drawing room. As soon as the porter had made up the drawing room the four of us went in. There were two

berths and a little couch in the drawing room. After entering the drawing room I retired. I retired into the lower berth. I discarded just my skirt and waist. Mr. Diggs got into that berth with me. Mr. Diggs discarded his coat and shirt I think, I think he took all his clothes off. Lola Norris got into the upper berth. She removed her skirt and waist. Mr. Caminetti afterwards occupied that berth with her. I only saw him take his coat off. Mr. Diggs and I continued to occupy that lower berth that night until about half past seven or eight o'clock, I think, in the morning. The upper berth was occupied by Miss Norris and Mr. Caminetti until the same time." (Transcript of Record, pp. 249, 250.)

There was certainly nothing in this testimony justifying the prosecuting attorney in telling the jury that the defendant Caminetti requested Maury I. Diggs and Marsha Warrington to go into the lower berth or that he requested Lola Norris to get into the upper berth. Lola Norris testified, as above referred to, that she got into the upper berth "*because the couch grew uncomfortable*". And yet the trial Judge, not only permitted the prosecuting attorney to make the remarks excepted to but approved of them, stating to the prosecuting attorney: "*Proceed. That is an inference that the jury may draw from the evidence, if they see fit.*"

"It is reversible error for the prosecuting attorney in his argument to the jury to assert facts and circumstances as being in the case which are not shown by the evidence, or to comment upon such facts, or to draw inferences from them unfavorable to the accused.

Some allowance, however, is made for the extravagance or imagination of the prosecuting attorney, and *a slight deviation from the record may be overlooked if the accused is not prejudiced thereby.*"

Cyc., Vol. 12, p. 574, and cases there collated.

It is respectfully submitted that the "deviation from the record", in the case at bar, was much more than "slight"; it was a marked and substantial deviation which necessarily prejudiced the defendant. It was a deliberate and wilful misstatement to the jury of an important fact which, if the jury believed the prosecuting attorney's statement of fact, as we must assume that it did, was bound to prejudice the defendant.

Furthermore, as aptly stated by the United States Supreme Court in the case of Hall v. U. S., 150 U. S. pp. 76, 82:

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, *gave the jury to understand that they might properly and lawfully be influenced by it*; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitled him to a new trial. (Citing Wilson v. United States, 149 U. S. 60, 67, 68 (30; 650, 652).)"

Other highly improper and prejudicial remarks were as follows:

"Mr. ROCHE. The great inducement was that he (Diggs) would marry her. The child would

be a bastard unless she married Maury I. Diggs, and it did not make any difference how sensitive she might be, if that same circumstance was held out to any woman she would be willing to tear a man away from his wife if by so doing she could give a name to a child she was about to bring into the world.

MR. WOODWORTH. We except to that language upon the ground that there is no evidence that the defendant had anything to do with that at all." (Transcript of Record, pp. 89, 418, 419; Assignment of Error No. 136.)

What the liaison of Maury I. Diggs with Marsha Warrington had to do with the guilt of the defendant Caminetti, in transporting, or causing to be transported, or aiding or assisting in the transportation of *Lola Norris* (not of *Marsha Warrington*), is difficult to understand. There is not the slightest pretense that the defendant Caminetti ever had any sexual relations with Marsha Warrington. There is not a scintilla of evidence that he, in any way, was responsible or contributed to her delicate condition. Marsha Warrington testified that it was Diggs, and *not* Caminetti, who was responsible for her pregnancy. She testified as follows:

"At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in the room by ourselves. Mr. Caminetti and Miss Norris were in another room. *I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.*" (Transcript of Record, p. 280.)

Under this state of the evidence, we submit that it was highly improper and most prejudicial to

the defendant for the prosecuting attorney to be permitted to refer to such an odious feature; to advert to the sexual relations existing between Diggs and Marsha Warrington, with which the defendant Caminetti had nothing whatever to do and for which he was not responsible, and to parade before the jury in lurid language the bastardy of any possible offspring as the result of the meretricious intercourse of Diggs and Marsha Warrington.

In the case of *Parker v. State*, 75 So. 437, it was held, in a prosecution for seduction, where the prosecuting attorney argued as follows:

“Miss Tedder is the mother of a three year old child. Parker is its daddy. By turning him loose she will have the care of raising and maintaining this outcast. It is your duty to protect this woman and as well see that this child has a legitimate father,”

that such remarks were reversible error on the ground that the prosecuting officer had urged improper considerations to secure a conviction.

See, on the subject generally,

People v. Hail, 19 Cal. App. Dec. 298, 309 et seq., and the cases there cited.

In the closing argument of Mr. Sullivan on behalf of the prosecution, the following highly improper comments were made with the approval and sanction of the Court:

“MR. SULLIVAN. Now, gentlemen, we come to the other question. Now and then through the case there was a reference directly or in-

directly made to it. They were frightened. But, gentlemen, not so much frightened by reason of their relations with Lola Norris and Marsha Warrington, but they were frightened because they had *ruined other girls*.

MR. WOODWORTH. We take an exception to that.

MR. SULLIVAN. Just wait awhile. I will show you the record. I will show you the record.

THE COURT. *That is a deduction which may be drawn from the evidence which is before the jury. Counsel has a perfect right to comment upon it.*

MR. WOODWORTH. *We except.*

MR. SULLIVAN. And their conduct with other young girls was established by the Probation Officer of the Juvenile Court of Sacramento. I refer to the testimony of Mr. M. J. Sullivan, appearing on page 200.

MR. WOODWORTH. If I remember correctly, your Honor ruled out any such questions.

MR. SULLIVAN. You don't remember correctly.

MR. ROCHE. You brought it out yourself, Mr. Woodworth, we did not.

THE COURT. Gentlemen, I will ask you to desist from any such passages. *There is evidence which I have indicated which warrants such an inference.* It is of course for the jury to draw that inference, or not, as accords with their own judgment. But where there is such evidence then of course counsel are at liberty to comment upon it.

MR. WOODWORTH. *We claim there is no such evidence, and we except.*" (Transcript of Record, pp. 94, 95, 423, 424; Assignment of Error No. 146.)

* * * *

"MR. SULLIVAN. And these are the young girls unquestionably referred to by Diepenbrock in his testimony, when about the same time he

called upon Diggs and told Diggs, 'You cannot make an assignation house of my building, you had young girls in your office last night'—young girls, mind you, he did not say young ladies, but young girls.

Mr. WOODWORTH. We except to the language of counsel upon the ground that it is not based upon any evidence in this case." (Transcript of Record, pp. 95, 424; Assignment of Error No. 147.)

It is quite evident, from the language above employed by the prosecuting attorney in his closing argument, that he was endeavoring to impress the jury with the fact that the defendant Caminetti was a libertine; that he had "ruined other girls", "young girls, mind you, he did not say young ladies, but young girls". By referring to "young girls", as distinguished from "young ladies", counsel evidently treated Marsha Warrington and Lola Norris as the "young ladies", and sought to impress the jury that the defendant had "ruined *other girls*", "*young girls*".

There is not a shred of evidence in the case that the defendant Caminetti had "ruined other girls". The remarks and argument of the prosecuting attorney, in this respect, were not based upon any evidence in the case nor upon any inference or deduction which might properly and legitimately be drawn from the evidence which was before the jury. The trial Judge was in error in stating to counsel and the jury:

"That is a deduction which may be drawn from the evidence which is before the jury.

Counsel has a perfect right to comment upon it."

It is well settled law that the prosecution could not introduce in evidence the fact that the defendant Caminetti had "ruined other girls". No testimony of his misconduct with females other than the one he was accused of having transported in interstate commerce, in violation of the "White-slave traffic Act", was admissible. The same rule necessarily obtains as does in a prosecution for rape, seduction, fornication, etc. In the case of *People v. Bowen*, 49 Cal. 654, 655, the Supreme Court of the State of California held that, on a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate. The Supreme Court said:

"At the trial, the Court allowed the prosecution, against defendant's objection, to introduce in evidence the declarations of defendant concerning his misconduct with other young girls. The attorney-general admits that this was error, and we agree with the attorney-general.

Judgment and order denying a new trial reversed, and cause remanded for a new trial."

This doctrine was reannounced in *People v. Stewart*, 85 Cal. 175, asserting the general rule that the prosecution cannot prove the commission by the defendant of other like offenses, for the purpose of increasing the likelihood that he committed the

particular offense charged. The Supreme Court said:

“The appellant relies, among other grounds for reversal, upon the alleged error of the trial Court in admitting evidence tending to show lewd, immoral, and indecent conduct of appellant with persons other than said Myrtle Collins, and tending to show lewd acts and occurrences between appellant and such other persons. The evidence of the prosecution, with the exception of the testimony of Myrtle Collins herself, consisted almost entirely of the testimony of five or six witnesses, to the effect that appellant had been guilty of lewd conduct with several other young girls, and tending to show that he endeavored to corrupt said other girls, and that he had sexual intercourse with some of them. This evidence was objected to by appellant, who took proper exceptions to its admission. The admission of this evidence was clearly reversible error. *There is no general rule more firmly settled than that the prosecution cannot prove the commission by a defendant of other offenses, for the purpose of increasing the likelihood that he committed the particular offense with which he is charged.* (People v. Lenon, 79 Cal. 628; People v. McNutt, 64 Cal. 116; People v. Barnes, 48 Cal. 551.) There is an exception to the rule which allows proof of other acts, in some exceptional cases, in order to show the *intent* with which the act charged was done; *but this exception does not apply to the case at bar.*”

In the case of People v. Elliott, 119 Cal. 593, 594, the defendant was indicted for having enticed a young unmarried girl, twelve years old. of previous chaste character, into a house of prostitution kept by the defendant, for the purpose of

prostitution, and the trial Court had admitted evidence of "other young girls" that the defendant had asked each of them to her house to have illicit intercourse with men. This was held to be error. The Supreme Court said:

"Three other young girls were called as witnesses by the prosecution, and, over the objection of defendant, were permitted to testify that defendant had asked each of them to go to her house to have illicit intercourse with men.

This character of evidence was erroneously admitted. (People v. Stewart, 85 Cal. 174.) While there are exceptions to the general rule excluding evidence as to other offenses, this case is not within those exceptions. *It comes squarely within the rule.*"

Authorities on this subject could be multiplied, but the general rule is so well established that we simply refer to the statement thereof set out in Cyc., Vol. 12, pp. 405-412.

In the case of People v. Crosby, 17 Cal. App. 518, 524 et seq., it was held that it was misconduct of the district attorney to ask the prosecuting witness whether the defendant said anything to her "about putting you in a house of ill-fame in Los Angeles, as he had done with *other girls* before that", and where it was objected to both as leading and assigned as gross misconduct on the part of the district attorney, it was held that the record was inconsistent with any theory which could justify or excuse the district attorney's conduct.

The defendant was indicted and was on trial, not with "ruining young girls", but was indicted

and was then on trial for violations of the "White-slave traffic Act", an enactment relating to the interstate commerce clause of the constitution of the United States.

It is well settled that

"It is error to permit the prosecuting attorney to argue upon matters *outside of the issues in the case* and which would not be *relevant if offered in evidence.*"

Cyc., Vol. 12, p. 525, and cases there cited.

In the case of *Hall v. United States*, 150 U. S. 76, 82, the United States Supreme Court said, in reviewing objectionable remarks of a prosecuting officer made during the argument of the case to the jury:

"This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had *murdered one man in Mississippi*, and should therefore be convicted of *murdering another man in Arkansas.*"

So in the case at bar, the prosecuting attorney was endeavoring to obtain a conviction of the defendant by arguing that the defendant must be guilty of having ruined Lola Norris because he had "ruined other girls". The language of the Supreme Court, just quoted, might well be paraphrased as follows: "This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had '*ruined other girls*', and should therefore be convicted of *ruining Lola Norris.*"

See, also,

Williams v. United States, 168 U. S. 382; 42 L. Ed. 509.

Assuming, for the sake of argument, that it would be proper, in a case involving the violation of the "White slave traffic Act", to prove that the defendant had "ruined other girls", there is not the slightest evidence in the case at bar that he did ruin other girls, nor any evidence from which any such inference or deduction might properly and legitimately be drawn.

We refer to all of the testimony on this subject in the record. (Transcript of Record, pp. 241-242, 424.) During the examination of M. J. Sullivan, a probation officer of the County of Sacramento, he gave the following testimony:

"Q. Is it not a fact, Mr. Sullivan, that warrants were issued from your department for the apprehension of Miss Norris and Miss Marsha Warrington and Mr. Diggs and the defendant here?

Mr. ROCHE. That question is objected to upon the ground that it is uncertain as to time. We have no objection to the question being limited to any time prior to this escape.

The COURT. Yes, if it was after that it would not be material.

Mr. WOODWORTH. The fact is that the warrants were issued after that time.

The COURT. Then it is not material.

Mr. WOODWORTH. We want to show that the inception of them, that the beginning of them, was previous to the 10th of March.

The COURT. Ask him whether any complaints were made before that date. The issuance of warrants after that date can have no bearing on the case at all.

Mr. WOODWORTH. Q. So far as you know personally, Mr. Sullivan, do you know whether any complaints or reports were made to you personally with reference to the apprehension of the four persons whom I have described, which resulted subsequently in the issuance of these warrants?

Mr. ROCHE. That question is objected to upon the same ground.

The COURT. The objection is sustained.

Mr. WOODWORTH. We note an exception.

The COURT. You are not concerned, and it is improper to refer to any warrants issued afterwards, even if they were issued. There is no evidence here that they were. You can ask him if any complaints were made.

Mr. WOODWORTH. Very well, your Honor.

Q. Were any complaints made to you personally with reference to these four persons, previous to the month of March, 1913?

A. *Only as to one person, Mr. Diggs; our attention was called to the fact that some girls were going into the Diepenbrock Theatre Building; and also to a man named Johnson—Johnson Whitman, and a man named O'Brien.*

That was before the 10th day of March. That was not with reference to these girls. *We have got those young ladies that they were mixed up with.* We never knew there were any such parties in existence by the name of Marsha Warrington and Lola Norris. These reports with reference to the person whom I have described as Diggs and another one as Whitman were made during the time that Mr. Diggs came to San Francisco. He was before the law here; it was in regard to the automobile. I went to his attorney, Mr. Charles B. Harris, who had returned from San Francisco, and I asked him to bring Mr. Diggs to our office, that I wished to talk to him concerning some young girls. That occurred before the 10th day of March; maybe 4 or 5 days; it was during the time

that he was in San Francisco, between that and the 10th day of March. Just about a week before.

On redirect examination, the witness, M. J. Sullivan, stated as follows:

I discovered who Mr. Whitman was. It was Mr. Caminetti, the defendant in this case. I subsequently ascertained who the girls were. They were not either Marsha Warrington or Lola Norris. One of the girls is now in the St. Catherine's Home, an institution here in San Francisco, and the other is at home with her parents." (Transcript of Record, pp. 241, 242.)

There was certainly nothing in the testimony of the above witness justifying the attorney for the prosecution in the violent inference or strained deduction that the defendant Caminetti had "ruined other girls". The witness does not even pretend to hazard such a statement. He says a complaint was made, but he does not pretend to say what the nature of that complaint was, or by whom it was made, whether by the girls themselves or by some one else, or that it was complained by anyone that the defendant Caminetti had ruined *any* girl. Whatever the complaint was, it was evidently not of sufficient gravity or seriousness to justify the issuance of any warrant against the defendant Caminetti, for the principal concern of the witness, as probation officer, seemed to be that he desired to interview Mr. Diggs. "I wished to talk to him concerning some young girls." He does not seem to have considered the complaint, if any there was against the defendant Caminetti,

of sufficient importance even to seek an interview with him. He does not testify that it was complained to him that any girls were ruined by the defendant. This witness does not pretend even to intimate that the defendant Caminetti ruined either the girl who was sent to St. Catherine's Home in San Francisco or the other one who lives with her parents. Therefore, there is nothing in the testimony of probation officer Sullivan, justifying the argument of the prosecuting attorney, in his closing address to the jury, that the defendant Caminetti had "ruined other girls", nor was the testimony given by him of such a character as to justify any fair or legitimate inference or deduction that he had "ruined other girls". The trial Judge was not justified, from this evidence, in stating to counsel in the presence of the jury: "*that is a deduction which may be drawn from the evidence which is before the jury. Counsel has a perfect right to comment upon it.*"

In view of the paucity of evidence in the case against the defendant to show that he had wilfully, unlawfully or feloniously, done anything to contribute to the transportation of Lola Norris for any immoral purpose whatsoever, it was highly improper and prejudicial for the prosecuting attorney to make the remarks he did and for the trial Judge not to check and reprove him, but, on the contrary, to approve the course and remarks made by the prosecuting attorney.

The overzealous conduct of the senior prosecuting attorney, in his closing argument to the

jury, was manifestly unfair to the defendant.

People v. Hail, 19 Cal. App. Dec. 298, 309
et seq.

See, also, cases cited on page 213 of this Opening Brief.

“It is the sworn duty of the district attorney to see that defendant shall have a fair and impartial trial, and that he shall be convicted only by competent evidence, and to secure this he should himself be fair and impartial.”

Cyc., Vol. 12, p. 571.

“It is not his duty to convict by illegitimate and unfair means, and while the Court will allow for the zeal which is the natural outcome of a legal contest, if by that zeal he is permitted to use unfair and unjust means to procure a conviction it will be reversed.”

Cyc., supra, citing:

People v. Lee Chuck, 78 Cal. 317; 20 Pac. 719;

State v. Irwin, (Ida., 1903) 71 Pac. 608;

People v. Carr, 64 Mich. 702; 31 N. W. 590;

People v. Dane, 59 Mich. 550; 26 N. W. 781.

See also,

People v. Derbert, 138 Cal. 467; 71 Pac. 564;

Newby v. People, 28 Colo. 16; 62 Pac. 1035;

Flint v. Commonwealth, 81 Ky. 186; 23 S. W. 346;

Leahy v. State, 31 Nebr. 566; 48 N. W. 390;

Randall v. State, 132 Ind. 539; 32 N. E. 305.

An excellent statement of the rule, relating to the conduct of prosecuting officers, is to be found

in the opinion of the Supreme Court of the State of California in the case of *People v. Lee Chuck*, 78 Cal. 317, 329, the opinion being delivered by Justice Works as follows:

“We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted was clearly incompetent. What was said was not only an argument in favor of its admission, but as to its effect. *The evident intent was to prejudice the jury against the defendant by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language the impropriety of which is apparent at a glance. The court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we*

hold it to have been error. See, as bearing on this point, *People v. Mitchell*, 62 Cal. 411, and cases cited; *State v. Smith*, 75 N. C. 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used." (*Italics ours.*)

The over-nourished zeal of counsel displayed in attempts to secure conviction for crime, frequently calls for condemnation on the part of the appellate Court, especially when in the closing argument to the jury the attorney for the prosecution travels outside the evidence for his facts or indulges in truculent abuse of the accused.

Smith v. People, 8 Colo. 457;

State v. Hannett, 54 Vt. 83;

Garlitz v. State, 71 Md. 293;

Martin v. State, 63 Miss. 505; 56 Am. Rep. 813;

Perkins v. Guy, 55 Miss. 153; 30 Am. Rep. 510;

Cavanah v. State, 56 Miss. 299.

Where the remarks of the district attorney prejudiced the minds of the jury, for that reason *alone* the judgment *should be reversed*.

Brown v. Swineford, 44 Wis. 282.

It is sufficient that extra professional statements of counsel may gravely prejudice the jury and affect the verdict.

Tucker v. Henniker, 41 N. H. 317;

State v. Smith, 75 N. C. 306;

Ferguson v. State, 49 Ind. 33;
 Newton v. State, 21 Fla. 53;
 State v. Underwood, 77 N. C. 502;
 Combs v. State, 75 Ind. 221;
 People v. Barker, 42 N. Y. S. R. 940;
 People v. Ah Len, 92 Cal. 282;
 Fuller v. State, 30 Tex. App. 559.

Not only were the remarks and arguments of the prosecuting attorneys highly improper and deeply prejudicial to the defendant, constituting reversible error, but the attitude and rulings of the trial Judge, in passing upon the improper remarks and arguments of the prosecuting attorneys, were equally reprehensible and erroneous. To repeat the language employed by the Supreme Court in the case of Hall v. U. S., *supra*:

“The presiding judge, by declining to interpose, notwithstanding the defendant’s protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. (Citing Wilson v. United States, 149 U. S. 60, 67, 68.)”

In the case of People v. Crosby, 17 Cal. App. 518, 526, the following language, apposite to the case at bar, was used:

“It appears, therefore, that the misconduct of the district attorney was accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act consti-

tuting the misconduct. When the attention of the court was directed to the act of the district attorney and the same assigned as misconduct, *it was the duty of the court to reprimand the district attorney, and admonish the jury to disregard the statement of the district attorney and the matters suggested by the question; thus, if possible, destroying the baneful effect thereof.* (Citing *People v. Bradbury*, 151 Cal. 678 (91 Pac. 497; *People v. Derwae*, 155 Cal. 592 (102 Pac. 466).)"

As was well said by the Court of Appeals for New York, in the case of *People v. Becker*, 104 N. E. 396, 402, 403:

"While the Courts are, as they should be, ready to make due allowance for some inadvertent slip made by zealous counsel in the heat and struggle of a bitterly contested trial, that consideration, of course, does not apply to the presiding judge, and no case will be found where there has been overlooked the failure or refusal of the trial Court in a desperate case like this to correct and check such important and repeated errors as these were. (Citing *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Conrow*, 200 N. Y. 356, 369, 93 N. E. 943.)"

Much that is said in the *Becker* case is applicable to the remarks and arguments of the prosecuting attorneys in the case at bar.

It is respectfully submitted that, upon the grounds alone of misconduct on the part of the prosecuting attorneys and of the trial Judge, urged in this subdivision of our Opening Brief, the defendant is clearly entitled to a reversal and new trial.

VII.

The Trial Court Erred In Refusing to Give the Several Instructions Requested on Behalf of the Defendant, Advising the Jury That Mere Presence by the Defendant Caminetti, Without any Act of Participation on His Part, Did Not Constitute the Commission of any Offense so far as He was Concerned.

The requested instructions, which the Court below refused to give, and to which timely exceptions were taken and assignments of errors now urged, are as follows:

“The Court erred in refusing to give to the jury instruction No. 99 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that the mere fact that the defendant was present, if you believe it to be a fact that he was present, at the time of the offenses charged to have been committed by Maury I. Diggs, would not be sufficient to warrant his conviction, or to justify you in finding him guilty. You must be satisfied, beyond a reasonable doubt, that he was not only present, but that he aided, abetted, counseled, commanded, induced, or procured a commission of the offense charged to have been committed by Maury I. Diggs, and if, from the evidence, you are not thus satisfied beyond all reasonable doubt and to a moral certainty that the defendant, although present, at the commission of the alleged offenses by Maury I. Diggs, aided, or abetted, or counseled, or induced, or procured the commission of the offenses charged by the government to have been committed by Maury I. Diggs, then it is your duty to acquit the defendant.” (Tran-

script of Record, pp. 112, 446, 461, 462; Assignment of Error. No. 184.)

McCoy v. State, 40 Fla. 494; 20 So. 485;
Jackson v. State, 20 Tex. 192.

“The Court erred in refusing to give to the jury instruction No. 100 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that the mere fact that the defendant was present, if you believe it to be a fact that he was present, at the time the offenses were charged to have been committed by Maury I. Diggs, would not be sufficient to warrant his conviction or to justify you in finding him guilty.” (Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 185.)

McCoy v. State, 40 Fla. 494; 20 So. 485;
Evans v. State, 109 Ala. 11; 19 So. 535;
State v. Vaughn, 200 Mo. 1; 98 S. W. 2;
State v. Fox, 70 N. J. L. 353.

“The Court erred in refusing to give to the jury instruction No. 107, requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that, in the first count of the indictment, the defendant is charged with having wilfully, knowingly and feloniously unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, a certain girl, to wit, one Lola Norris, for the purpose of

debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and mistress of the said defendant.

You are instructed, under the first count of the indictment, that before you will be authorized or justified in convicting the defendant, you must first be satisfied to your entire satisfaction and beyond all reasonable doubt that the defendant did some act of a material, substantial character by virtue of which the said Lola Norris was transported or caused to be transported, or aided or assisted in obtaining transportation for, and in transporting her in interstate commerce. And in this connection, I charge you that the act of transportation, or of causing to be transported or aiding or assisting in obtaining transportation, must have been some such act as that which led to the purchase of tickets, or furnishing the means with which to purchase tickets, or some such act resulting in the transportation, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did commit some substantial material act resulting in the transportation of Lola Norris for the purpose alleged in the indictment and with the intent denounced by the law and alleged in the indictment, it will be your sworn duty to acquit him" (Transcript of Record, pp. 115, 446, 464; Assignment of Error No. 189.)

"The Court erred in refusing to give the jury instruction No. 109 requested by defendant, which instruction was in the words and figures following, to wit:

You are further instructed that it is not sufficient for the prosecution to show to your entire satisfaction and beyond all reasonable doubt, that the defendant was present, if you should find that he was present, at the time that the tickets were purchased by Maury I. Diggs, or

that he knew that said tickets had been purchased by Maury I. Diggs, but it is incumbent on the prosecution to prove to your entire satisfaction and beyond all reasonable doubt that the defendant not only was present at the time the tickets were purchased by Maury I. Diggs and that he knew the purpose for which the tickets were purchased by said Maury I. Diggs, but it must prove, as alleged in the first and second counts of said indictment, that said defendant did some act of a material, substantial nature in transporting or causing to be transported, or in aiding or assisting in obtaining transportation for Lola Norris and Marsha Warrington, or either of them, in interstate commerce for the specific purpose of debauchery and for the immoral purpose alleged in the indictment, and unless you shall so find beyond all reasonable doubt, it will be your duty to acquit the defendant." (Transcript of Record, pp. 116, 446, 465; Assignment of Error No. 190.)

State v. Molloy, 44 Ia. 104;

Ward v. Com., 77 Ky. 233.

"The Court erred in refusing to give to the jury instruction No. 111 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that the mere presence or the mere knowledge of the defendant of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, and with which this defendant is also charged in a separate indictment, is not sufficient to warrant his conviction or to justify you in finding him guilty.

You must be satisfied, beyond all reasonable doubt, not only that he was present or had knowledge of the commission of the offenses claimed by the prosecution to have been com-

mitted by Maury I. Diggs, but you must be further satisfied, beyond all reasonable doubt, that he then and there knew that the specific intent and purpose of said Maury I. Diggs in committing the offenses claimed by the prosecution to have been committed by said Maury I. Diggs was the specific purpose and intent denounced by the White Slave Traffic Act, to wit, for the purpose of debauchery and for an immoral purpose as alleged in the indictment.

Moreover, you must further be satisfied, beyond all reasonable doubt, not only that the defendant had the knowledge of the intent and purpose of said Maury I. Diggs in committing offenses claimed by the prosecution to have been committed by said Maury I. Diggs and in which it is claimed by the prosecution the defendant wilfully and knowingly participated. but you must further be satisfied, beyond all reasonable doubt, that the defendant, having such knowledge, just referred to, did aid, or abet, or counsel, or command, or induce, or procure the commission of the offenses claimed by the prosecution to have been committed by said Maury I. Diggs, and if you have any reasonable doubt as to any of the matters just referred to, it is your sworn duty to give the defendant the benefit of that doubt and acquit him." (Transcript of Record, pp. 117, 446, 466, 467; Assignment of Error No. 192.)

State v. Gatlin, 170 Nev. 354; 70 S. W. 885;

Burrell v. State, 18 Tex. 713;

McCoy v. State, 40 Fla. 494.

"The Court erred in refusing to give to the jury instruction No. 114 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that you are not to permit yourselves to be influenced by the fact

that Maury I. Diggs, the defendant in another case, may or may not be guilty under the indictment and proofs presented in the case against him, but you are to try this defendant and to base your verdict, if satisfied of his guilt to a moral certainty and beyond a reasonable doubt, solely and exclusively and entirely upon the indictment in this case and upon the testimony, proofs and evidence in this case and in this case alone." (Transcript of Record, pp. 119, 446, 468; Assignment of Error No. 195.)

McCoy v. State, 40 Fla. 494.

We respectfully insist that the requested instructions, or at least some of them, should have been given by the trial judge. They should have been given, in view of the very meagre evidence contained in the record. While the distinction between a principal and an accessory has been abolished by federal statute, as well as by the laws of the State of California, still, in view of the extreme paucity of the evidence, upon which the prosecuting attorneys sought to convict the defendant Caminetti on the first count of the indictment, the jury should have been fully advised as to what acts or conduct on the part of the defendant Caminetti constituted him such a participant in the commission of the alleged offense in count one of the indictment as to constitute him a principal. It is most significant, as showing the extreme paucity of the evidence, that the defendant was acquitted on the other three counts of the indictment.

Section 332 of the Criminal Code of the United States provides:

“Whoever directly commits any act constituting any offense defined in any law of the United States, or aids, or abets, counsels, commands, induces, or procures its commission, is a principal.”

Section 971 of the Penal Code of the State of California contains a substantially similar provision.

Inasmuch as it affirmatively appears in evidence that defendant Caminetti did not buy the ticket, with which Lola Norris traveled in interstate commerce between Sacramento to Reno, and that he did not furnish the money with which the ticket was purchased; that he did not purchase the Pullman ticket for Lola Norris nor did he furnish the money with which the same was purchased; that there is no competent or legal evidence that he ever had any understanding or agreement with Diggs to reimburse the latter; that the latter's act in furnishing the transportation was purely voluntary and gratuitous on his part; that the defendant committed no act, directly or indirectly, contributing to the transportation, or causing the transportation, or aiding or assisting in the transportation of Lola Norris, in interstate commerce from Sacramento to Reno, we respectfully contend that the jury should have been fully instructed and advised as to just what acts would constitute the defendant Caminetti a principal.

Confessedly, mere presence at the commission of an offense or mere knowledge that an offense is about to be committed, without any participation in

the same, does not render one amenable to the law either as a principal or an accessory.

“To render one guilty as an accessory before the fact he must have participated in or instigated the crime. Bare concealment of the fact that a felony is about to be committed, or failure to endeavor to prevent it, is not enough.”

Cyc., vol. 12, p. 191, and cases there cited.

It appears affirmatively in evidence that the first discussion, when the subject of leaving Sacramento was brought up, took place between Maury I. Diggs and Marsha Warrington, at which neither the defendant Caminetti nor Lola Norris were present, and was occasioned chiefly because of the unfortunate delicate condition in which Miss Warrington found herself as the result of her indiscretions with Diggs, and not with the defendant Caminetti (Transcript of Record, pp. 261, 262, 280). The latter certainly could not be said to have aided, or abetted, or counseled, or induced, or had any guilty connection with that matter.

It also affirmatively appears in evidence that he was not present at the *decisive* interview between Maury I. Diggs and Marsha Warrington and Lola Norris, held on Sunday, March 9, 1913, at the Plaza in Sacramento, at which Lola Norris and Marsha Warrington made up their minds to leave Sacramento (Transcript of Record, p. 264). The defendant Caminetti certainly could not be said to have aided, or abetted, or counseled, or induced, or had any guilty connection with that feature of the case.

While it may be true that he was present at and took part in other previous interviews, yet it must be remembered that at those previous interviews the young women positively declined to leave Sacramento; but, at the decisive interview or conference held at the Plaza, on March 9, 1913, at which the defendant Caminetti was not present, it was then that the young women, after listening to the statements of Diggs, resolved to leave Sacramento.

At the most, his only participancy with the transportation, or causing to be transported, or aiding, or assisting, in the transportation of Lola Norris, in interstate commerce, from Sacramento to Reno, of which he was convicted on the first count of the indictment, seems to have been in his accompanying Maury I. Diggs, Marsha Warrington and Lola Norris on the trip from Sacramento to Reno. Outside of his mere presence and going with them, he did nothing except to "just stand around" (Transcript of Record, p. 249) with them and to agree to everything that they did. He was no more active in the actual furnishing of transportation than Marsha Warrington or Lola Norris.

We respectfully submit that, under the meagre evidence adduced against the defendant Caminetti, as to what he actually did, to support the charge upon which he was convicted on the first count of the indictment, the trial Judge should have given at least some of the instructions requested on behalf of the defendant and set forth above.

In this connection, we also urge the trial Judge committed reversible error in instructing the jury as follows:

“As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.” (Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

There was no sufficient evidence to justify such an instruction; there was no sufficient legal evidence that there was an understanding between the defendant Caminetti and Diggs that the defendant Caminetti was thereafter to contribute thereto by reimbursing Diggs. Such an instruction, under the state of the evidence, was unjustified and erroneous.

In a previous portion of this Opening Brief (Subdv. V. thereof; pp. 170-206) we alluded to the only testimony in the record (of Marsha Warrington and of Lola Norris) on this subject, and there pointed out that this testimony is totally insufficient, both in fact and law, to sustain a judgment of conviction. We contended that either the motion to acquit should prevail on the first count of the indictment, and

have been granted or, thereafter, certainly the motion in arrest of judgment.

All that Marsha Warrington testified on the subject of any reimbursement by the defendant to Diggs for Diggs' purchase of the railroad ticket for Lola Norris was:

“The way I UNDERSTOOD IT Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.”
(Transcript of Record, pp. 248, 266, 267.)

As we pointed out, in the previous portion of this Opening Brief, the “understanding” of Marsha Warrington cannot be dignified by the name of evidence, especially in a criminal case involving the liberty of the accused. Again, as a matter of law, we directed the attention of this Appellate Tribunal to the proposition that Marsha Warrington was an accomplice of the defendant and that the only corroboration of her “understanding” was the testimony of Lola Norris, another accomplice, and we referred to the well established rule of law that one accomplice cannot corroborate another accomplice.

Cyc., Vol. 12, pp. 458, 459, and cases there cited.

We also referred to the testimony of Lola Norris, who testified:

“Mr. Caminetti and Mr. Diggs *were* to share the expenses.” (Transcript of Record, p. 303.)

We also showed the unreliability of this testimony of Lola Norris, and adverted to the fact that she

also was an accomplice and was corroborated, if corroborated at all, only by another accomplice, Marsha Warrington.

Without elaborating further on this branch of the argument, we respectfully submit that there was no sufficient legal evidence to justify the trial Judge in instructing the jury as he did, in reference to any understanding that he had with Diggs, that he was thereafter to contribute to the furnishing of the transportation by Diggs by reimbursing Diggs, and that this instruction was erroneous, unjustified and constitutes reversible error.

As was well said by the Supreme Court of the State of California in the case of *People v. Keefer*, 65 Cal. 232:

“However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.”

So, in the case at bar, the defendant was entitled to some of the instructions requested by him upon the theory that his testimony was entirely true and that he did not “participate in or instigate the crime.”

VIII.

The Trial Court Erred In Refusing to Give Instruction No. 116 Requested on Behalf of Defendant, Which Instruction Was as Follows:

“You are hereby further instructed that in every offense amounting to felony there must be a joint union of act and intent. And in this connection I further instruct you that the mere fact that the defendant may have given \$20 to Lola Norris to buy her own ticket or to buy the ticket of Marsha Warrington or both to Reno, and that neither one or both actually did purchase a ticket, is not of itself sufficient to constitute an act or offense within the meaning of the White Slave Traffic Act. It must further appear and to your satisfaction beyond a reasonable doubt that the \$20 or some portion thereof was actually used by Lola Norris or Marsha Warrington in the purchase of a railroad ticket to Reno as charged in the indictment, and if it does not so appear to your satisfaction and beyond a reasonable doubt it will be your duty not to consider the mere giving of the \$20 by the defendant, if you believe such to be the fact, to Miss Lola Norris for the purpose of purchasing her ticket or that of Miss Warrington’s, as any offense within the meaning of the ‘White Slave Traffic Act.’ ”
(Transcript of Record, pp. 121, 469; Assignment of Error No. 197.)

By all means, this instruction should have been given. As heretofore stated in this Opening Brief, it appeared affirmatively and without contradiction that the \$20, which the defendant Caminetti gave to Lola Norris, was never used by her to purchase any ticket for herself or Marsha Warrington, but, on

the contrary, was returned to the defendant Caminetti. The money, with which the tickets were purchased, came from and was paid by Maury I. Diggs.

Under this state of facts, the cautionary instruction requested should have been given, so as to prevent confusion in the minds of the jurors. Especially should this instruction have been given, in view of the charge to the jury actually given by the trial Judge that:

“You will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, *or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.*”
(Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

The jury should have been warned that the mere giving of the \$20 by the defendant Caminetti to Lola Norris should not be considered by them, in view of the fact that it affirmatively appeared from the testimony of Lola Norris herself, and also of Marsha Warrington, that the \$20 was never used by Lola Norris to buy any railroad transportation whatever and that the money was afterwards returned to the defendant Caminetti and some disposition made of it other than for transportation purposes in interstate commerce. The jury may well

have considered, for aught that appears and in view of the instructions actually given by the trial Judge, that the mere giving of \$20 by the defendant Caminetti to Lola Norris for the purpose of buying a ticket was sufficient to justify a verdict of conviction on the first count of the indictment, even though the money was never actually used for that purpose and was in fact actually returned to the defendant Caminetti.

Furthermore, the refusal of the Court to instruct the jury as requested failed to take into account the *locus poenitentiae* which existed from the time the defendant Caminetti gave Lola Norris the \$20 for the purchase of her ticket until the *time of the actual purchase* of the ticket. As we have seen, Lola Norris never used any portion of the money to purchase any tickets for herself or anyone else. We, therefore, respectfully submit that the above instruction should have been given.

IX.

The Trial Court Erred in Refusing to Give the Following Instruction Requested on Behalf of Defendant:

“In considering the testimony of the witness, Lola Norris, and determining the credibility to be attached thereto, and the weight to be given her evidence, you may consider her motive in testifying, whether or not she has been, or appears to be acting under the influence of any person or persons, whether or not any promise of immunity has been offered to her, and any hope she may have for leniency in any criminal action brought against herself.” (Transcript of Record, pp. 98, 449; Assignment of Error No. 154.)

Cochrane v. State, 113 Ga. 726.

Not only did the trial Judge refuse to instruct the jury that Lola Norris was an accomplice of the defendant Caminetti, but he refused to give the cautionary instruction above requested. He did this, in face of the fact that it affirmatively appeared in evidence that the witness Lola Norris was under arrest and then out on bail in the sum of \$1000 on warrants issued by the state authorities in Sacramento for her complicity in leaving Sacramento with the defendant Caminetti and going with him to Reno, Nevada. (See Transcript of Record, pp. 326, 327, 328.)

Lola Norris testified as follows:

“While I was in Reno and after I came back to Sacramento *I had friendly feelings toward Mr. Caminetti* for a while. *I don't know what you mean by friendly now.* When I went to Reno I had *an affection for him.* *I do not feel*

*that same disposition toward him at this time. I take the Sacramento papers. I saw quite a number of items about Mr. McNab. I don't remember that one in particular to the effect that Mr. McNab, the United States Attorney, had received information that the girls and the parents objected to prosecuting the men under the 'White Slave Act', that McNab was going to get their statements and in case the girls did not testify he had provided himself with detention warrants. I don't remember seeing in the papers notice to the effect that unless we girls were willing witnesses that we ourselves would be arrested and prosecuted. I think I saw something like that in the 'Bee', substantially to the effect that if the girls do not tell the story he will have them arrested and detained as witnesses, and he says he thinks that the young women will consider it advisable to tell the truth. We take the 'Bee' at home. I remember the last part of an article on March 25th, saying in substance and effect—purporting to be a letter from Mr. McNab, that his idea was that what should be done with myself and Miss Warrington would be influenced somewhat by our evidence and good faith in testifying in the case, and that he may be able to learn in a few days how willing we are to testify. Mr. McNab came to see me in Sacramento. * * * My father and mother and myself discussed these newspaper articles. I believe there was some charges filed against us when we were at Reno but that was, as I understand it, merely to compel us to come back to Sacramento. It was thought there that Mr. Diggs and Mr. Caminetti would not allow us to return, and charges were filed for that reason, as I understand it. I don't know very much about it, but I believe there is such a warrant; Probation Officer Sullivan swore out complaints against Marsha Warrington and myself*

on March 15th, after we came back from Sacramento and that we are out on \$1000 bail, and the complaints are still pending.'"

A reading of the above testimony will readily disclose the propriety of having instructed the jury as requested on behalf of the defendant. The credibility of Lola Norris, the weight to be given her evidence, her motives in testifying, whether or not she had been, or appeared to be, acting under the influence of anyone in giving her testimony, whether or not any promise of immunity had been offered to her, or any hope held out to her that she might have leniency in any criminal proceeding against her; all these matters were for the jury to pass upon in determining what weight and credibility to attach to her testimony. .

X.

The Trial Court Erred In Failing to Give the Following Instructions, Requested on Behalf of Defendant:

"You are further instructed that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of his innocence consistent with the facts proven." (Transcript of Record, pp. 96, 446, 447; Assignment of Error No. 149.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

People v. Roberts, 1 Cal. App. 447.

"The Court instructs you that in civil cases, if there be conflicting evidence, the duty of the jury is to weigh it, and render a verdict according to its preponderance; but in criminal cases, the guilt of the accused must be fully proven, and it is not sufficient that the weight of the evidence points to his guilt." (Transcript of Record, pp. 108, 446, 458; Assignment of Error, No. 176.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

Bones v. State, 117 Ala. 138; 23 So. 138.

These instructions should have been given, in view of the very meagre, if not entire absence of evidence, disclosed by the record against the defendant.

Furthermore, the difference between the amount of proof required in a criminal case and a civil suit should have been explained to the jury. Especially so, where, as in the federal Courts, jurors are required to try both criminal and civil cases during the term of their jury service.

XI:

The Trial Court Erred In Failing to Give the Following Instructions Requested on Behalf of Defendant as to Circumstantial Evidence:

“You are hereby further instructed that insofar as the prosecution relies upon circumstantial evidence to establish the guilt of the defendant, to authorize a conviction on circumstantial evidence, ‘each of the circumstances should not only be consistent with the defendant’s guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt.’” (Transcript of Record, pp. 97, 446, 448; Assignment of Error No. 151.)

People v. Nelson, 85 Cal. 421;

State v. Lucas, 97 N. W. 1007.

“I further instruct you that to warrant a conviction on circumstantial evidence ‘each fact in any chain of facts from which the defendant’s guilt is to be inferred must be proved by the same weight, degree and the force of the evidence as if it were the main fact of the defendant’s guilt itself. All of such facts must be consistent, each with all of the others, and with the defendant’s guilt, and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant’s guilt.’” (Transcript of Record, pp. 97, 98, 446, 448, 449; Assignment of Error No. 152.)

People v. Anthony, 56 Cal. 600;

People v. Ah Ching, 54 Cal. 402;

State v. Gatlin, 170 Mo. 354; 70 S. W. 885.

“The jury are instructed that in order to convict the defendant upon circumstantial evi-

dence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty." (Transcript of Record, pp. 98, 446, 449; Assignment of Error No. 153.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;
Benton v. State, 78 Ark. 284.

The above instructions were all taken from approved authorities and should have been given.

The prosecution relied, for a verdict of guilty on the first count of the indictment, upon circumstantial as well as direct evidence. The prosecuting attorneys adverted to the circumstantial evidence time and again in their opening and closing arguments to the jury. The jury should have been instructed very fully upon the law of circumstantial evidence. The trial Judge, outside of a short instruction to the effect that each link in a chain of circumstantial evidence must be supported by the same degree of proof (Transcript of Record, p. 433), only gave to the jury the following brief instruction:

"And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant

be innocent.” (Transcript of Record, pp. 433, 434.)

In view of the wide range which the trial Judge permitted in the introduction of the evidence, treating the prosecution as akin to one for conspiracy, the above instruction was entirely too limited, to be of any effective assistance to the jury. The question of the intent and purpose of the defendant in going with Lola Norris from Sacramento to Reno was one of the principal points, if not the principal point, for the jury to pass upon in arriving at the defendant's guilt or innocence. This was largely, if not entirely, a question of circumstantial evidence. The trial Judge did not hesitate to instruct the jury as follows:

“The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be adduced from the *circumstances shown in the evidence*, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deduction therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. *Of course it is an inference or deduction but it is a very usual and proper one. Indeed if such were not*

the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men, committing a wrongful act, do not ordinarily proclaim in any open, definite manner the real purpose or intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established." (Transcript of Record, pp. 431, 432.)

In view of the above charge to the jury, the trial Judge should also have given the instructions on circumstantial evidence requested on behalf of the defendant. If the learned trial Judge attributed so much importance to the circumstances in evidence tending to show the intent and purpose of the defendant, he should certainly have given the instructions on the weight, scope and proper limitation of circumstantial evidence in determining guilt, requested by counsel for the defendant. In refusing to do so, we respectfully submit that he committed serious error.

XII.

The Trial Court Erred In Refusing to Give the Following Instructions Requested on Behalf of Defendant:

“You are hereby further instructed that the specific intent denounced by the statute, known as the White Slave Traffic Act, and alleged in the indictment must have existed at Sacramento, State and Northern District of California, the place where the offences are alleged to have been committed, or at least within the State and Northern District of California, and must have existed at the time the alleged violations of the statute in question are charged to have been committed, and if it should appear from the evidence that the specific intent and purpose denounced by the White Slave Traffic Act and alleged in the indictment was not formed and did not exist until after the parties transported had passed the boundary line dividing California from Nevada, then it is your duty to acquit this defendant, as the intent must have existed at the time of the commission of the acts complained of, which are charged in the indictment to have been committed in Sacramento, State and Northern District of California.” (Transcript of Record, pp. 120, 444, 446, 468; Assignment of Error No. 196.)

Campbell v. State, 35 Ohio St. 70.

“The Court instructs you that it is not a crime under the laws of the United States for the defendant to have performed the acts set forth in the indictment, if the same were wholly committed in the State of California, nor would the same be a crime by the laws of the United States, under the allegations of the indictment, unless the defendant used a common carrier engaged in business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become

the concubine and mistress of the defendant. If you do not find from all the evidence that the defendant used a common carrier engaged in the business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant, it will be your duty to find the defendant not guilty." (Transcript of Record, pp. 111, 460, 446; Assignment of Error No. 181.)

Both of these instructions should most certainly have been given. The locus, where the specific intent denounced by the "White Slave Traffic Act" was first formed, was one of the pivotal points in the case. The prosecution stoutly maintained that the illegal intent and purpose had been formed by the defendant before passing the boundary line dividing Nevada from California. The defense as vigorously contended, in the first place, that no illegal intent and purpose, that is, the illegal intent and purpose denounced by the "White Slave Traffic Act", was formed at all; and, in the second place, if any such intent and purpose were formed, that it was not formed within the State and Northern District of California; that no intent and purpose was formed until after the defendant and Lola Norris had passed the state line and had almost arrived at Reno. The importance of this point, in determining the guilt or innocence of the defendant, cannot be overestimated. It was the crux of the whole case. The defense contended, and introduced evidence in support thereof, that the purpose and intent in leaving Sacramento was to escape

impending notoriety, scandal and disgrace, bodily harm and probable arrest, and that it was not for the purpose alleged in the first count of the indictment and denounced by the "White Slave Traffic Act", to wit:

"that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant." (Transcript of Record, p. 2.)

The defense contended, and the evidence on that point is uncontradicted and irrefutable, that what the defendant and Lola Norris were to do or how they were to live upon reaching Reno was not considered by them or even discussed until they were almost on the verge of reaching Reno. This is the incontestable evidence in the case. This feature has already been adverted to in a previous portion of this Opening Brief, under the fifth subdivision thereof, in which we urge that a reversal should follow because of the refusal of the trial Judge to instruct the jury to acquit, or in refusing to grant the motion in arrest of judgment, upon the ground that there was no evidence sufficient to justify submitting the case to the jury or to sustain the judgment of conviction. (See pages 170-206 of this Opening Brief.)

The intent of the defendant was the vital point in the case. The *time of the formation of this intent* was equally important. This is clearly illustrated by the following heated passage between the prosecuting attorneys and counsel for the defendant.

During Mr. Roche's opening argument to the jury, the following occurred:

"MR. ROCHE. They agreed *before they left the confines of the State of California* and *before the train reached Reno*, that they would take assumed names and would hire a bungalow at Reno.

MR. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will find the testimony on pages 222-225 of the record. *That was after they crossed the state line.*

MR. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the state line, and before the train passed from the confines of the State of California into the State of Nevada* these two men then agreed to take fictitious names, and that these two men *at that time* made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live. Counsel in his statement virtually admitted that and he said that what happened at Reno was merely incidental and accidental.

MR. WOODWORTH. I did not say that, Mr. Roche. I said they had determined to leave Sacramento and that what happened after they got to Reno was accidental and incidental.

THE COURT. This jury is a jury of intelligent men. If counsel misstate the evidence to them in any wrong way they will be able to determine that. I would not interrupt. Counsel is entitled to a legitimate limit within which to give his views of the evidence.

MR. WOODWORTH. But he is not entitled to misquote counsel. I said what happened after they arrived at Reno was accidental and incidental.

The COURT. Counsel is characterizing it. I have never observed that these interruptions of this character, unless it is of a very flagrant kind, accomplished anything except simply delay.

Mr. ROCHE. That fact has been established by the government, gentlemen of the jury, although the defendant did not undertake to enlighten you on that matter himself.

Mr. WOODWORTH. We except to that again." (Transcript of Record, pp. 416-417.)

In that connection, we again refer to the testimony of M. L. Jones, the conductor upon the Southern Pacific Company's train that transported Lola Norris and the defendant Caminetti from Sacramento to Reno, who testified:

"I recall that the train reached Reno on the morning of the 10th at 11-47. * * * The train passed over the state line about 10-40 or a little later probably." (Transcript of Record, p. 158.)

Miss Warrington testified:

"I recall the time the train reached Reno. Before the train reached Reno and during sometime that morning, Mr. Diggs and Mr. Caminetti discussed the question of renting a house of some sort. *Mr. Diggs and Mr. Caminetti, Miss Norris and myself were to live in this house. That discussion took place just before we got to Reno. Possibly half an hour before.* After alighting from the train at Reno we went to—I don't know where it was, and had lunch. I think it was the Thomas Grill. The four of us had lunch. *The train reached Reno around noon I think.*" (Transcript of Record, p. 250.)

Miss Norris testified:

"There was a conversation before we reached Reno, as to what names should be assumed by Diggs and Caminetti. They discussed different names that they might use and finally decided on Ross and Enright." (Transcript of Record, p. 273.)

Miss Norris further testified:

"Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

She further testified:

"*Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody.*" (Transcript of Record, pp. 309, 310.)

Under this state of the evidence, the first discussion as to what was to be done and how they were to live after reaching Reno took place about 11 o'clock that morning, or fully one half an hour after the train had passed over the state line. The train reached Reno on the morning of March 10th, 1913, at 11-47. It passed over the state line "about

10-40 or a little later probably". Miss Warrington recalled the time that the train reached Reno, "around noon." She swears that:

"That discussion took place *just before* we got to Reno. *Possibly half an hour before.*"
(Transcript of Record, p. 250.)

In view of this uncontradicted evidence, coming from the lips of the witnesses for the prosecution themselves, the trial Judge should have granted the motion to instruct the jury to acquit. He should have granted the motion in arrest of judgment. *At the very least*, he should not have refused to give the above instructions requested on behalf of the defendant.

We respectfully submit that a mere reading of the record in the case discloses that the above instructions, requested by counsel for defendant, should have been given by the trial Judge. Inasmuch as the act of transportation, of which the defendant was accused and convicted, is a continuous offense, it may well be that the jury considered that the intent or purpose could be formed at any time while the defendant was on the train and previous to reaching Reno even though the state line had been passed and the defendant and Lola Norris had passed beyond the jurisdiction of the State and Northern District of California. The trial Judge should have given the above instructions, under the evidence adduced in the case, and his refusal to do so constitutes serious error.

XIII.

The Trial Court Erred In Refusing to Give at Least Some of the Several Instructions Requested on Behalf of the Defendant Relating to the Question of the Specific Intent Denounced by the "White-slave Traffic Act".

All of these requested instructions may be considered together. We state, frankly, that we did not expect the trial Court to give all of the instructions requested on the subject of the intent and purpose of the defendant, but we do contend, with all deference to the learned trial Judge, that some of these instructions, at least, should have been given.

As previously stated, the question of the intent and purpose of the defendant in leaving Sacramento with Lola Norris was one of the, if not the most, important and vital points in the case, which were submitted to the jury in determining the defendant's guilt or innocence. The jury should have had the benefit of any instructions which would have assisted it in arriving at an intelligent and just conclusion with respect to the intent and purpose of the defendant.

It was the contention of the government that the intent and purpose of the defendant in leaving Sacramento with Lola Norris was

"that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant." (See Indictment, Transcript of Record, p. 2.)

It was the contention of the defendant that he left Sacramento with Lola Norris for *no such purpose*; that he would have left Sacramento, as disclosed by the testimony, even though Lola Norris had not accompanied him (Transcript of Record, p. 407); that the defendant testified, without contradiction: " 'Then I am gone.' I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town"; that the intent and purpose of his leaving Sacramento, as well as that of Lola Norris, was to avoid the impending notoriety, scandal and disgrace that both expected would fall upon them should they remain in Sacramento, because of their indiscretions (Transcript of Record, p. 318); that he feared the wrath of Maury I. Diggs' father, who blamed the defendant for the wayward conduct of his son; that he was fearful of the steps that Maury I. Diggs' wife might take against him, as she also blamed him for her husband's neglect and escapades; that he was worried as to what course his own wife might take against him, in the way of a divorce or in appealing to the Juvenile Court at Sacramento; that he feared, on account of the anger and resentment of Maury I. Diggs' father, that he might lose his position with the Board of Control at Sacramento, as the latter had threatened to report him and have him discharged as not being a fit person to be employed by the state government; that he was apprehensive of arrest by the juvenile authorities in Sacramento because of his association with Lola Norris, then just under the

age of 21 years; that for all of these reasons and others appearing in evidence he left Sacramento to avoid trouble, disgrace, personal harm and impending arrest and did *not* leave with the then purpose and intent of cohabiting with Lola Norris as his concubine or mistress as charged in the indictment. (Transcript of Record, pp. 402-407.)

All these matters were placed in evidence and testified to, not only by Marsha Warrington and Lola Norris, but by I. P. Diggs, the father of Maury I. Diggs; by Lina Diggs, the wife of Maury I. Diggs; by Elizabeth Caminetti, the wife of the defendant; by T. H. Warrington, the father of Marsha Warrington; by M. J. Sullivan, a probation officer of the County of Sacramento; by W. E. Norris, the father of Lola Norris; by J. A. Putnam, editor of the sporting columns of the Sacramento "Bee"; by D. T. Leitch, C. L. Avery, P. J. O'Brien and by M. H. Diepenbrock, all residents of Sacramento.

Lola Norris testified, on cross-examination, as follows:

"Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?

The COURT. Q. Was it to get out of Sacramento or to get out of the state?

A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face any disgrace that might come up; I don't remember that anything was said about getting

out of the state. *The idea was to avoid any notoriety or scandal that might arise.*" (Transcript of Record, p. 318.)

Marsha Warrington testified:

"Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

Lola Norris further testified:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. *Never by anybody.*" (Transcript of Record, pp. 309-310.)

It would prolong to unwarranted limit this already too lengthy brief, even to give an epitome of the testimony of each one of the above witnesses, but a reading of the evidence contained in the Transcript of Record will disclose the facts just as we have stated them. The intent and purpose of the defendant in leaving Sacramento and going to Reno was to avoid trouble, notoriety, scandal,

disgrace, bodily harm, and, as he feared, to escape arrest by the state authorities in Sacramento. The intent and purpose of Lola Norris in leaving Sacramento and accompanying the defendant was substantially the same. This intent and purpose was, obviously, totally inconsistent with the intent and purpose denounced by the "White Slave Traffic Act" and charged in the indictment. After arriving at Reno, *after crossing the state line*, whatever was done by the defendant and Lola Norris of an immoral nature was a matter of afterthought and subsequent arrangement and had nothing to do with the *original intent and purpose of the defendant and of Lola Norris in leaving Sacramento*. Under this view of the case and in consideration of the contention of the defendant, made clear repeatedly to the trial Judge from the examination of the witnesses by his attorneys, and their statements to the Court and their arguments to the jury, we respectfully submit that at least some of the subjoined instructions should have been given by the trial Judge.

We append all of the requested instructions on this subject, which were refused by the trial Court:

"The Court instructs you that in every case where a specific intent is necessary in order to constitute a particular crime, the burden of proving such specific intent is upon the prosecution; and unless they prove that specific intent or state of mind to your satisfaction beyond all reasonable doubt, it is your duty to acquit." (Transcript of Record, pp. 101, 446, 452; Assignment of Error No. 161.)

“The Court instructs the jury that where a defendant is charged with the violation of a statute which expressly requires, in order to render an act punishable, that it should be done with a specific intent or purpose or state of mind, if from ignorance of law; or from any other reason that specific intent does not exist; there is lacking one of the elements of the crime, and if you find from the evidence in this case that through ignorance of the law the defendant did not have that specific intent and state of mind charged in the indictment, it is your duty to acquit him regardless of how you view his conduct otherwise.” (Transcript of Record, pp. 102, 446, 452; Assignment of Error No. 162.)

“The Court instructs you that the mere taking away or transporting, or purchasing tickets for transportation or transporting, or inducing or enticing a female to go to a state other than the State of California is not in itself a crime unless these acts are done with the specific intent and purpose alleged in the indictment.” (Transcript of Record, pp. 102, 446, 452; Assignment of Error No. 163.)

People v. Black, 147 Cal. 426.

“You are instructed that when one is said to have taken away a female for the purpose of concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her, and to have continual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your duty to find him not guilty.” (Transcript of Error, pp. 103, 446, 453; Assignment of Error No. 164.)

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did, that there existed in his mind the purpose and intent that the said Lola Norris should become the mistress and concubine of said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Lola Norris, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal.” (Transcript of Record, pp. 103, 446, 453; Assignment of Error No. 165.)

“In determining whether or not at the time of the alleged commission of the offense charged in the indictment, the defendant had the specific state of mind charged, you may consider all the evidence relating to such acts and relations of the parties, and, if after a full and careful consideration of all the evidence, you are not satisfied beyond all reasonable doubt that the state of mind alleged in the indictment actually existed, but believe that defendant’s acts were actuated by motives other than that alleged it is your duty to find him not guilty.” (Transcript of Record, pp. 105, 446, 454, 455; Assignment of Error No. 168.)

“If you find from the evidence in this case that the main purpose and intent of defendant in taking the said Lola Norris from the State of California into the State of Nevada, if you find beyond all reasonable doubt that he did

so take her, was fear of publicity or disgrace or fear of arrest, and that he took her from the state to avoid public disgrace or for any other reason than that charged in the indictment, you cannot convict the defendant as to that charge, but must acquit him." (Transcript of Record, pp. 105, 446, 455; Assignment of Error No. 169.)

"You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Lola Norris, 'for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be, and become the concubine and mistress of said defendant.' In order to convict the defendant upon this count of said indictment it is essential that the prosecution prove beyond all reasonable doubt, not only that the said Lola Norris was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Lola Norris, after such transportation had been accomplished." (Transcript of Record, pp. 105, 106, 446, 455, 456; Assignment of Error No. 170.)

People v. Black, 147 Cal. 426.

"Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in company of Lola Norris was to avoid notoriety that the defendant expected would result in the publication in

a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Lola Norris was not that charged in the indictment, it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 109, 110, 446, 459; Assignment of Error No. 178.)

"The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Lola Norris from Sacramento to Reno was that she should become the mistress and concubine of the defendant. It is claimed on the part of the defense that such was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento, for a brief period, and that it was no part of his purpose to have Lola Norris as his concubine and mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring a verdict of not guilty." (Transcript of Record, pp. 110, 446, 459; Assignment of Error No. 179.)

"The Court instructs the jury that it is one of the material facts for the prosecution to prove and establish to your satisfaction beyond a reasonable doubt the guilty intention of the defendant, and such intent must be established to your satisfaction beyond a reasonable doubt like any other facts required to be proven in the case. Such intent may be proven by circumstances or by the direct testimony of the witnesses, but unless it is proven to your satisfaction beyond a reasonable doubt that the

acts charged in the indictment were done for the purpose and with the intent charged in the indictment, it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 111, 446, 460; Assignment of Error No. 180.)

"The court instructs the jury that although the defendant took Lola Norris from Sacramento to Reno and had sexual intercourse with her, the defendant cannot be convicted unless the jury finds also that the purpose of the defendant in leaving Sacramento was to have sexual intercourse with her or to make her his mistress and concubine as charged in the indictment. If the jury find that such was not his purpose, or have a reasonable doubt that such was his purpose, you will return a verdict of not guilty." (Transcript of Record, pp. 111-112, 446, 461; Assignment of Error No. 182.)

"You are further instructed that the mere fact that the evidence may show or tend to show, if you believe it to be a fact, that the defendant and Lola Norris may have had sexual relations after their arrival at Reno, Nevada, is not of itself sufficient to justify or authorize you to convict the defendant on the first count of the indictment, but you must also be further satisfied to your entire satisfaction and beyond all reasonable doubt that the defendant wilfully, knowingly, and feloniously, unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for and in transporting in interstate commerce the said Lola Norris, and that he then and there had the purpose in mind of debauchery and for an immoral purpose, to wit: that the said Lola Norris should be and become the concubine and mistress of the defendant.

The intent and purpose of the defendant at the time of the act of transportation alleged against him is the *very gist and question* in the case and unless this intent and purpose is proved to your satisfaction beyond all reasonable doubt, it will be your sworn duty to acquit the defendant even though you may be satisfied that the defendant and Lola Norris may have had sexual relations after their arrival at Reno, State of Nevada." (Transcript of Record, pp. 114-115, 446, 463; Assignment of Error No. 188.)

Athanasaw v. United States, 227 U. S. 326.

"You are hereby further instructed that if you are satisfied from all of the evidence presented in the case that the intent and purpose of the defendant in going from Sacramento to Reno was to avoid scandal and notoriety and was not for the purpose alleged in the four counts of the indictment namely, a purpose of debauchery and for an immoral purpose in that Lola Norris and Marsha Warrington should become the concubines and mistresses of the defendant and Maury I. Diggs respectively, or if you have a reasonable doubt, after considering all the evidence in the case, as to the real purpose and intent of the defendant in going from Sacramento to Reno, or as to the real purpose and intent of the defendant, in doing any of the acts charged against him in the indictment then it is your sworn duty to acquit the defendant." (Transcript of Record, pp. 117, 446, 465, 466; Assignment of Error No. 191.)

In order to determine whether the trial Judge should have given any of the instructions above requested, it is important to ascertain just what the trial Judge did instruct the jury on the sub-

ject of the specific intent and purpose denounced by the "White Slave Traffic Act". We set this out in full.

The learned trial Judge charged the jury as follows:

"You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of committing any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the *initiation of any such act*. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. *It is sufficient if it co-exists with the commission of the act*. The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deduction therefrom which men of ordinary experience and observation in the affairs of life would naturally draw.

When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Of course it is an inference or deduction but it is a very usual and proper one. Indeed if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men, committing a wrongful act, do not ordinarily proclaim in any open, definite manner the real purpose of intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established." (Transcript of Record, pp. 431, 432.)

The trial Judge further instructed the jury, on the question of intent and purpose, in the following language:

"As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself, and his companion Diggs, from which it is claimed that their sole actuating motive on leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all

before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from the fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*

“If, therefore, you find that these girls were transported to Reno by the defendant and his

companion Diggs, in the manner claimed by the prosecution, and the evidence in behalf of the defendant as to the motive or intent with which such transportation was had is not such as appeals to your hard, practical reason and common sense, in the light of all the other evidence and when all the acts of the defendant are considered, *you are not compelled to believe it.* As aptly suggested by one of the defendant's counsel in his argument, there is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. *If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your findings as to his intent upon the acts committed by him.*

And even should you find that the defendant and his companion Diggs were actuated in their departure or flight from Sacramento by fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, then you will be justified in finding the defendant guilty. If that immoral purpose was one motive inducing him to take these girls with him, it would matter not that he may also have been actuated by his fears or other consideration moving him to take that trip; he would nevertheless be guilty." (Transcript of Record, pp. 439, 440, 441.)

The first criticism, that we have to offer to the instructions to the jury as given by the trial Judge, is that he did not give sufficient prominence to the element of "reasonable doubt". We repeatedly took exceptions to the charge as given on that ground. (See Transcript of Record, pp. 444, 445, 446; Assignments of Errors Nos. 201, 202, 203, 204, 205, 206, 207.)

The instructions requested by us, which were refused, made it very clear to the jury that the question of specific intent and purpose was one of the most material ingredients of the offenses charged and that the government was bound to prove the specific intent and purpose of the defendant *beyond* "*reasonable doubt*".

Nor did the trial Judge give sufficient prominence, in his charge to the jury, to the various features revolving around the main contention of the defendant, to wit: that he left Sacramento to escape impending notoriety, scandal, disgrace and probable arrest as well as fear of bodily harm.

With all due deference to the learned Judge, we incline to the opinion that this portion of the charge, as to the intent and purpose of the defendant, was much too favorable to the government and did not do the defendant full and impartial justice. The trial Judge should have given at least some of the instructions requested by the defendant as to his intent and purpose in leaving Sacramento. The jury should have been fully advised as to the

various features of this all-important question in the case. It is to be observed that the trial Judge gave great prominence to the relations existing between the defendant Caminetti and Lola Norris after their arrival at Reno and during their temporary sojourn of three days in the bungalow at Reno. He said, among other things:

“If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, *then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him.*” (Transcript of Record, pp. 440, 441.)

This charge to the jury was certainly prejudicial to the defendant. The trial Judge could have modified his remarks, and placed before the jury the question of intent and purpose more fully and fairly to the defendant by also giving some of the instructions which were refused.

Furthermore, the charge as given was radically erroneous, as already pointed out in subdivision III of this Opening Brief, in instructing the jury, after some slight reference to the evidence on behalf of the defendant tending to show threats emanating from the father of Maury I. Diggs, etc., etc., that:

“This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind.* Now it was the defendant’s privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, *to take this omission of the defendant into consideration.*

“A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from the fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, *and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*” (Transcript of Record, pp. 439, 440.)

It is difficult to escape the conclusion that the effect of the trial Judge's charge to the jury, especially on the question of the intent and purpose of the defendant in leaving Sacramento, was to belittle and disparage the defense. This would have been obviated, to some extent at least, had the learned trial Judge given some of the instructions requested by the defendant. The evidence presented in the case, both on behalf of the prosecution and the defendant, justifies us in claiming that the trial Judge committed reversible error in refusing to give at least some of the instructions requested on behalf of the defendant on the all-important question of the intent and purpose of the defendant in leaving Sacramento.

XIV.

The Only Issue Involved in the Indictment Escaped the Attention of the Trial Court. This Issue was Also the Only Issue in the Evidence. The Whole Charge of the Trial Court to the Jury was, for This Reason, Misleading and Erroneous and the Jury Was Blinded as to the Real Issue. By Reason of This, Therefore, Defendant Failed to Receive a Fair and Impartial Trial.

(Transcript of Record, pp. 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 446, 451-461; Assignments of Error Nos. 160, 164, 165, 166, 167, 170, 178, 179, 180, 183.)

The whole charge to the jury is pregnant with the above misconception indulged in by the trial Court.

The Court labored under the impression that the defendant was charged with the interstate transportation of the women for the purpose of "*debauchery*." The prosecution also misconceived the nature of the issue.

The indictment charges that the defendant transported Lola Norris over the lines of the Southern Pacific Railway, etc., with the intent and purpose that she should "be and become the *concubine* and the *mistress* of the said defendant". The indictment expressly limits the immoral purpose to that of becoming the *mistress* of the defendant. (Transcript of Record, p. 2.)

That, and that only, is the crime charged against this defendant in the indictment.

The trial Court and the prosecution labored under the impression that the crime charged was the interstate "*debauchery*" of the woman. The terms "*debauchery*" and "other immoral purpose" (practice) used in the indictment are general terms. But the indictment specifically *limits* the meaning of the general words and charges a *limited* offense. The general words are limited and controlled by the specific words following them—"to wit, that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant."

It is elementary that, where the words of the statute are general, it is necessary to particularize in the indictment.

Mr. Justice Field, in *United States v. Hess*, 124 U. S. 483; 31 L. ed. 516, said:

"The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issue could be formed for submission to a jury."

To the same effect, see:

Keck v. U. S., 172 U. S. 434; 43 L. ed. 505;

Evans v. U. S., 153 U. S. 584, 587;

U. S. v. Britton, 107 U. S. 655, 661;

U. S. v. Carll, 105 U. S. 611, 612;

U. S. v. Mann, 95 U. S. 580, 585.

As stated, the terms "debauchery" and "other immoral purposes" (practices), used in the statute, are general terms.

The word "debauchery", in the statute, means carnal knowledge, sexual intercourse of a girl or woman.

State v. Reeves, 97 Mo. 668; 10 S. W. 841;
10 Am. St. Rep. 349.

As was well said by this appellate tribunal, in the very recent case of *Suslak v. United States*, 213 Fed. 913, 917:

"Moreover, the denunciation of the law is not against transportation for the purpose of *debauchment*, but for the purposes of *debauchery*. In the Century Dictionary *debauchery* is defined as:

"'Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.'

"So Webster, while giving, as one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:

"'Excessive indulgence of the appetites, especially excessive indulgence of lust; intemperance; sensuality; habitual lewdness.'

"It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act."

Athanasaw v. U. S., 227 U. S. 326; 57 L. ed. 528.

The uses to which a girl or woman could be subjected by a white slaver, so as to make such female a *debauchee*, and her master a criminal under the Act, are numerous. He could be a pan-

derer for other men. He could compel her to submit to an animal,—a dog, or to a man, in a licentious exhibition, to which admission is charged. These are common practices in large cities, especially in Europe.

Lewd exhibitions, in which she could be compelled to expose herself—her naked body—or practice immoral parts, not amounting to debauchery, would come within the term “other immoral purpose” (“other immoral practices”). Under this, would come public masturbation and other practices too vulgar to mention. Also, she could be compelled to use her mouth with men—a practice common in Europe, and especially in France.

These are but a few illustrations of practices to which white women and girls are today being subjected by white slavers. It was for the purpose of reaching this class of human beasts that the Act was passed.

See:

“The Battle With the Slums,” pp. 69-75, by Jacob A. Riis, N. Y. The MacMillan Company, 1902.

Therefore, in order to allege facts in an indictment under this statute, “upon which issue could be formed for submission to a jury”, it becomes necessary to particularize. The framer of the indictment in the case at bar did so.

The issue in the case at bar was: Did the defendant transport Lola Norris to "be and become the *concubine* and the *mistress* of the defendant"?

In the first portion of its charge to the jury, the trial Court goes at length into the statute. The language, used to inform the jury of the law covering the case and by which they shall be governed, is couched in the general expressions contained in the statute. (Transcript of Record, pp. 425-431.) *They are not in any manner qualified or limited to cover or explain the issue involved.* Then, later, where the Court defines and charges the jury upon the criminal intent (Transcript of Record, pp. 431-432), the same general language is used.

The framer of the indictment recognized the rule and alleged the facts which constituted the criminal act; but nowhere did the trial Judge charge the jury on the real issue involved. To be sure, the Judge defined the terms "concubine" and "mistress", but never once did he inform the jury that the defendant was charged with transporting the women for the purpose of making them such. On the other hand, the Court expressly led the jury to believe that the defendant was charged with merely seducing the woman, and that, if they so found, they were bound to find the defendant guilty as charged. Our contention is borne out by a reference to the definition given by the trial Court, with painstaking particularity, to the term "debauchery". (Transcript of Record, pp. 429, 430.)

The defendant, as we heretofore stated, was *not charged* with "debauchery", but this definition, given with such minute particularity, and in words, which seemingly covered the defendant's relation with the woman covering a period long prior to the trip to Reno, could not effect a result on the jury other than we maintain.

On page 440 of the Transcript of Record, the trial Court goes even farther and practically withdraws the issue from the consideration of the jury in these words:

"There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him."

The whole charge of the Court in the case at bar is on a parity with the charge reviewed by the Supreme Court in the Hickory case. (Hickory v. U. S., 160 U. S. 408, 421-422; 40 L. ed. 474.)

Mr. Justice White, on page 422, in part says:

“The instruction as to the probative weight which the jury should attach to the fact of flight was equally erroneous. It was as follows: ‘And not only this, but the law recognizes another proposition as true, and it is that “the wicked flee when no man pursueth, but the innocent are as bold as a lion.” That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply to this case.’ This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt.”

From the portion of the charge quoted above, it is most certain that the real issue in the case at bar was lost to the trial Judge. There was no issue in the evidence as to the sexual relations; there was even no issue as to the co-habitation; but there was issue joined—and it was the only issue in the case—upon the allegation “for the purpose

* * * that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant.”

We respectfully submit that a man may seduce a woman, and yet that woman, as a matter of law, may not be either his *mistress* or his *concubine*. We also respectfully submit that a man may “co-habit” with a woman not his wife, and still, as a matter of law, that woman might not be his *concubine* or his *mistress*.

But the lower Court assumed, as a matter of law, that if the jury should find that the defendant Caminetti co-habited with—slept with—or seduced—the woman, that in any such event he was guilty as charged.

We respectfully submit that this portion of the charge invaded the province of the jury. That it took away from the consideration of the jury the only issue in the case and left that body with nothing to do but return a verdict of guilty.

Instructions, legally correct in themselves as independent propositions, or as applied to an appropriate state of facts, are erroneous if applied to a state of facts to which they are not adapted.

Pond v. Williams, 1 Gray 630, 636;

Wright v. Old Colony & Fall River Railroad Co., 9 Gray 413;

Brightman v. Eddy, 97 Mass. 478.

They tend to mislead the jury either into the supposition that a proper state of facts exists to which

the propositions are to be applied by them, or into drawing the suggested inference from facts which do not authorize it.

Commonwealth v. Maloney, 113 Mass. 211.

The trial Judge should have given our requested instructions numbered 38, 45, 46, 47, 48, 54, 92, 93, 94 and 98. (Transcript of Record, pp. 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 446, 451, 453, 454, 455, 456, 459, 460, 461; Assignments of Error Nos. 160, 164, 165, 166, 167, 170, 178, 179, 180, 183.)

The defendant was entitled to have the only issue alleged in the indictment and raised by the evidence submitted to the jury. He was entitled to have it clearly stated to the jury that he was not on trial for general immorality or for any other conduct of a reprehensible nature; that he was not on trial for having co-habited with—slept with—or seduced—Lola Norris; but that he was charged *only* and on trial *upon the single issue* that it was his intent and purpose: “That the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant.” (Transcript of Record, p. 2.)

The trial Court gave to the words “concubine” and “mistress”, contained in the above averment in the indictment, “too wide a meaning”.

In the case of *Suslak v. United States*, *supra*, this appellate tribunal, in passing upon an instruction by the trial Court dealing with the words “unlawful cohabitation”, which was the immoral purpose alleged in the indictment in that case, said:

“On the other hand, we think that the trial court gave to ‘unlawful co-habitation’ too wide a meaning. It is to be noted that this phrase is not used in the White Slave Act at all. The act denounces transportation for the purpose of prostitution or debauchery, ‘or for any other immoral purpose’; and the one count in the indictment upon which this question arises charges transportation ‘for an immoral purpose, to wit, for the purpose of unlawful co-habitation’. It is a question, therefore, not of the construction of the language of the act, but of the proper interpretation or construction of the indictment. The pleader might have selected any appropriate language to describe the species of immorality intended to be charged, and, having chosen a *legal phrase* for the purpose, *it is to be presumed that it was employed in its legal sense*. In that view, the first part of the instruction is free from serious objection, but it is inaccurate to say that it would be unlawful co-habitation if a man and a woman, being unmarried, simply ‘intended to live together’ as man and wife, or if the man, having another room, intended repeatedly to visit at the woman’s room for the purpose of sexual intercourse. Such intention must be put into actual practice; there must be an actual living together. While it may be true that joint occupancy of the same room is not under all circumstances essential, still it is clear that where the man and woman do not dwell in the same house, and the visitation for sexual intercourse is clandestine, and there is no other association together after the manner of husband and wife, the relation, however immoral and unlawful, does not constitute unlawful co-habitation. (Citing Anderson’s Dictionary of Law; Words and Phrases, vol. 8, p. 7188; Cannon v. United States, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561; Turney v. State, 60 Ark. 259, 29 S. W. 893.)”

Furthermore, under the peculiar circumstances of the case at bar, the jury should have been clearly instructed that the fact that the defendant may have been guilty of some offense, or general immoral conduct, other than that charged in the indictment and denounced by the "White-slave traffic Act", should not influence their judgments in considering his guilt or innocence on the charges upon which he was being tried.

What was said by the Court of Appeals of New York, in the now celebrated case of *People v. Becker*, 104 N. E. Rep. 396, 400, is peculiarly pertinent to the case at bar:

"Of course, if this judgment of conviction is to be affirmed, it must be done because the defendant is guilty of murder and *not because he was guilty of 'grafting' or official misconduct, however iniquitous and despicable they may have been.*"

So, in the case at bar, however reprehensible may have been the conduct of the defendant, as disclosed by the record, the jury should have been told that he could be convicted only because he was guilty of a violation of the "White-slave traffic Act", and not because of any general immoral conduct or of his guilt of some offense other than a violation of the "White-slave traffic Act".

Had the indictment, in the case at bar, been more general in its averment of the intent and purpose of the defendant, it may well be that the learned Judge of the Court below would have been

justified in refusing to give the instructions requested by us, but, in view of the limitation which the prosecutor saw fit to allege in the indictment, he was bound thereby, and the jury should have been clearly instructed to that effect, and it was reversible error for the trial Judge to refuse the instructions requested by us on this phase of the case.

The requested instructions, which were refused, are as follows:

“You are instructed that the defendant is on trial for the crime charged in the indictment in this case and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, unless the same is declared to be criminal, and even if you find the defendant’s conduct has been very reprehensible morally, still, if you are not convinced of his guilt beyond all reasonable doubt of the crime charged in the indictment, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise.” (Transcript of Record, pp. 101, 446, 451; Assignment of Error No. 160.)

Stuart v. People, 73 Ill. 20.

“You are instructed that when one is said to have taken away a female for the purpose of concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her; and to have continual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your

duty to find him not guilty.” (Transcript of Record, pp. 102, 103, 446, 453; Assignment of Error No. 164.)

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did, that there existed in his mind the purpose and intent that the said Lola Norris should become the mistress and concubine of said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Lola Norris, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal.” (Transcript of Record, pp. 103, 446, 453; Assignment of Error No. 165.)

“You are instructed that one, two, or even half a dozen acts of illicit intercourse would not of themselves constitute concubinage, but there must exist a purpose and intent to have an habitual and continued illicit cohabitation with the woman in question, and you must believe beyond a reasonable doubt, before you can convict the defendant under this indictment, that his purpose was that the said Lola Norris should be and become his concubine and mistress, and that his purpose was not merely to have illicit sexual intercourse with her; for if his purpose was merely to gratify his desires by rape, seduction or fornication, he would not be guilty under this indictment, and you must

acquit him.” (Transcript of Record, pp. 104, 446, 454; Assignment of Error No. 166.)

“You are further instructed that defendant is charged with the crime alleged in the indictment in this case, and no other offense. The burden of proving every material allegation of this indictment is upon the prosecution and if they fail to so prove to your satisfaction beyond all reasonable doubt, it is your duty to acquit, even though you may be satisfied the defendant is guilty of some crime other than that charged.” (Transcript of Record, pp. 104, 446, 454; Assignment of Error No. 167.)

“You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Lola Norris, ‘for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be, and become the concubine and mistress of said defendant.’ In order to convict the defendant upon this count of said indictment it is essential that the prosecution prove beyond all reasonable doubt, not only that the said Lola Norris was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Lola Norris after such transportation had been accomplished.” (Transcript of Record, pp. 106, 446, 455, 456; Assignment of Error No. 170.)

“Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in company of Lola Norris was to avoid notoriety that the defendant expected would result in the publication in a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Lola Norris was not that charged in the indictment, it will be your duty to return a verdict of not guilty.” (Transcript of Record, pp. 109, 110, 446, 459; Assignment of Error No. 178.)

“The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Lola Norris from Sacramento to Reno was that she should become the mistress and concubine of defendant. It is claimed on the part of the defense that such was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento, and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento for a brief period, and that it was no part of his purpose to have Lola Norris as his concubine and mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring in a verdict of not guilty.” (Transcript of Record, pp. 110, 446, 459; Assignment of Error No. 179.)

“The Court instructs the jury that is one of the material facts for the prosecution to prove and establish to your satisfaction beyond a reasonable doubt the guilty intention of the defendant, and such intent must be established

to your satisfaction beyond a reasonable doubt like any other facts required to be proven in the case. Such intent may be proven by circumstances or by the direct testimony of the witnesses, but unless it is proven to your satisfaction beyond a reasonable doubt that the acts charged in the indictment were done for the purpose and with the intent charged in the indictment, it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 110, 111, 446, 460; Assignment of Error No. 180.)

"The Court instructs you that you are to consider only the crime with which the defendant is charged. If you find from the evidence that he is not guilty of the offense charged in the indictment, it will be your duty to find him not guilty, although you may believe him guilty of some other offense. The defendant has a legal right to insist that all the elements that constitute the crime with which he is charged shall be proven to your satisfaction to a moral certainty and beyond a reasonable doubt, and unless such element is so proven it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 112, 446, 461; Assignment of Error No. 183.)

Furthermore, the charge to the jury, above quoted, is erroneous in another material respect. A defendant in a criminal action testifying in his own behalf is entitled to have his testimony submitted to the jury. The instruction complained of practically informed the jury that they should disregard all the testimony of the defendant touching his reasons for going to Reno—it practically withdrew from

the consideration of the jury defendant's testimony upon the subject of intent.

People v. Keefer, 65 Cal. 232.

This assignment of error, alone, should entitle the defendant to a new trial.

“An instruction which is calculated to confuse and mislead the jury should not be given. And if the instruction of the court be given, in terms which may have misled the jury, it is ground of reversal; especially if it appears that they were actually misled.

Appellate practice—Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court.”

7 Encyc. of U. S. Sup. Ct. Repts., tit. “Instructions”, p. 33, Sec. 9 and cases cited.

XV.

The Trial Court Erred In Refusing to Give the Following Instructions Requested on Behalf of the Defendant:

“In a criminal case, admissions and confessions of the accused are admitted with caution, and the court tells you that it is your province to consider all the circumstances under which the alleged admissions were made, and determine their exact nature, import and meaning.” (Transcript of Record, pp. 100, 446, 451; Assignment of Error No. 159.)

“I further charge you that some evidence has been offered of statements made by the defendant shortly after his arrest upon warrants issued at Sacramento for violations of the law of the State of California and not for any violation of the White Slave Traffic Act, and I charge you in relation thereto that such statements so made shortly after his arrest are to be received with great caution; for besides the danger of misapprehension of a witness, or the misuse of words, the failure of the party to express his own meaning, it should be recollected that the mind of the defendant himself is often oppressed by the calamity of his situation and you should further consider whether or not the defendant at that time was endeavoring to shield Miss Norris and Miss Warrington in their good names and from prosecution by the state authorities.

And in this connection you are to consider all the facts and circumstances surrounding the making of such statements by the defendant as well as the statements made by Miss Lola Norris as to the truthfulness of the statements made by Miss Lola Norris, for the purpose of determining whether or not the statements made by the defendant at that time were true or were simply feigned for the purpose of

warding away suspicion and of shielding Miss Lola Norris or Miss Warrington or both.” (Transcript of Record, pp. 121, 122, 446, 469, 470; Assignment of Error No. 198.)

“You are hereby instructed that no pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate in any Court of the United States, in any criminal proceeding, and in this connection I instruct you to disregard entirely from your consideration in this case any and all statements claimed to have been made by the defendant to Assistant District Attorney Atkinson, the Assistant District Attorney of Sacramento, Sacramento County, California, it appearing that such statements were made while the defendant was under arrest by the state authorities at Sacramento, California, and that such statements were obtained by means of the judicial proceeding then pending in the state Courts at Sacramento, California.” (Transcript of Record, pp. 122, 123, 446, 470; Assignment of Error No. 199.)

In urging, upon this appellate tribunal, a reversal for error in failing to give the above instructions, or some of them, much that is argued in a subsequent portion of this Opening Brief, under subdivision XXI hereof, in contending that the statements or admissions of the defendant, sought to be established through the witness W. E. Doan, were inadmissible, is applicable to the failure of the trial Judge to give the above instructions requested on behalf of the defendant. Avoiding repetition, we

refer to the argument subsequently urged and respectfully submit that, in view of the peculiar circumstances under which the statements or admissions of the defendant were obtained, the above instructions, or at least some of them, should have been given by the trial Judge.

XVI.

The Trial Court Erred In Refusing to Give the Following Instruction Requested on Behalf of the Defendant:

“I further instruct you that you are not to permit yourselves to be influenced by the fact that Maury I. Diggs, the defendant in another case, may or may not be guilty under the indictment and proofs presented in the case against him, but you are to try this defendant, and to base your verdict, if satisfied of his guilt to a moral certainty and beyond all reasonable doubt, solely and exclusively and entirely upon the indictment in this case and upon the testimony, proofs and evidence in this case and in this case alone.” (Transcript of Record, pp. 119, 120, 446, 468; Assignment of Error No. 195.)

We contend that it was reversible error on the part of the trial Judge not to give the above instruction.

A casual reading of the record discloses that the trial Judge, by reason of the liberality of his rulings in favor of the prosecution, permitted the evidence in the case to take a very wide range; in fact, way beyond the single issue presented by the indictment. On this account, the conduct and acts of Maury I. Diggs were given great prominence and may be said to permeate the entire case. Although the defendant was not on trial for a conspiracy with Maury I. Diggs to violate the “White-slave traffic Act”, the trial Judge, in his rulings admitting evidence against the defendant, practically took the attitude that many of the things said and done by Maury I. Diggs

could be admitted in evidence against the defendant Caminetti, inasmuch as the prosecution was one akin to a conspiracy. (Transcript of Record, pp. 252, 253, 217.) We have already complained of these rulings of the trial Judge in previous portions of this Opening Brief. We do insist that, in view of the rulings of the trial Judge in admitting evidence as to the things said and done by Maury I. Diggs and in view of the great paucity of evidence against the defendant Caminetti, the above cautionary instruction requested on behalf of the defendant should have been given. The jury should have been clearly and distinctly instructed that they should not permit themselves to be influenced by the fact that Diggs, the defendant in another case, might or might not be guilty under the indictment and proofs presented in the case against him. It must be remembered that reference was constantly made to the Diggs case during the trial. Even, during the opening argument of one of the prosecuting attorneys, the Diggs case was alluded to (Transcript of Record, p. 418.) The prosecuting attorney, in that argument, even went so far as to state to the jury that: "It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case."

Without dilating further on this assignment of error, we respectfully submit that the state of the record fully justifies us in the contention we make that the trial Judge committed reversible error in not giving the above instruction.

XVII.

The Trial Court Erred in Its Instruction to the Jury as Follows:

“As I have indicated to counsel *in passing upon the defendant’s motion to instruct the jury to acquit*, the evidence introduced before you by the Government, if believed by you, is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of these counts.” (Transcript of Record, pp. 48, 412-414, 438, 439; Assignment of Error No. 17.)

The trial Court’s instruction to the jury was entirely too strong and amounted, practically, to an instruction to convict.

In the case of *Breese v. United States*, 108 Fed. 804, being a decision by the Circuit Court of Appeals for the 4th Circuit, it was held that an instruction, on a trial for violating the banking law, that, “in his opinion, it was the duty of the jury to convict the defendant”, was ground for new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the Court.

Twice did the trial Judge distinctly tell the jury that the evidence was sufficient, in law, to justify the conviction of the defendant on all four counts of the indictment.

The first time, as stated by him in the above instruction, was “in passing upon the defendant’s motion to instruct the jury to acquit”, and the sec-

ond was when he instructed the jury as above stated. Such comments must have had a deep effect upon the jurors and were highly prejudicial to the defendant. In fact, a perusal of the entire charge, as well of the rulings throughout the trial, compels us to state that the trial Judge believed the defendant guilty on all four counts of the indictment and considered it proper to impart his views to that effect to the jury. We respectfully submit, that, under the circumstances disclosed by the record in this case, what the learned trial Judge said in the presence of the jury, in denying the motion to instruct to acquit, and afterwards in delivering his instructions to the jury, was not only a plain and open declaration to the jury that the trial Judge was convinced of the guilt of the defendant, but that his language and remarks were tantamount to an instruction to convict.

See particularly on this subject, the remarks of the Court of Appeals of New York, in the leading case of *People v. Becker*, 104 N. E. 396, 408.

XVIII.

The Trial Court Erred in Its Refusal to Instruct the Jury as Follows:

“I further instruct you that before a statement or declaration by one conspirator, made after the consummation of the conspiracy or the commission of the crime, is competent against the other, it must not only appear that they were uttered in his presence, but it must further also appear that the circumstances must have been such as to call for a denial by the accused and to have given him an opportunity to make such denial.” (Transcript of Record, pp. 119, 446, 467; Assignment of Error No. 194.)

If the learned Judge of the Court below attributed so much importance to the conspiracy features of the prosecution, as indicated repeatedly by his rulings on the subject, he certainly should have given the above instruction.

In this connection, we beg to refer to the authorities and the rules of law cited in the subdivision of this Opening Brief, immediately succeeding the one now under consideration.

XIX.

The Trial Court Erred in Admitting the Following Testimony:

“Q. After the two bills were paid by one of the individuals because you did not have any change to change both gold pieces, what if anything was said by either of the two men in the presence of the other as to their destination?

Mr. WOODWORTH. That is objected to as immaterial, irrelevant and incompetent, a proper foundation is not laid for the conversation.

The COURT. The objection is overruled.

Mr. WOODWORTH. We reserve an exception.

A. The gentleman, I could not say which one, but one remarked that they had tickets for Denver and wanted to catch No. 10.

Q. Do you recall at what time No. 10 left that morning?

Mr. WOODWORTH. Just a moment. I move that the answer be stricken out upon the ground that it is unfair, he cannot say which one said it.

The COURT. They were both together, he says.

Mr. WOODWORTH. They were both together, but it makes a great deal of difference who made the statement.

The COURT. Oh, no, not materially. Statements made in the presence of the defendant are just as material, unless he repudiates them, as though they were made by him. It all goes to the jury for them to determine the facts.

Q. When that statement was made by one of these two individuals was there any objection of any kind to that statement emanating from the other party?

Mr. WOODWORTH. That is objected to as immaterial, irrelevant and incompetent and an improper question to ask; and further that it is asking for the opinion of the witness.

The COURT. The objection is overruled.

Mr. WOODWORTH. We reserve an exception.

The COURT. You mean was there anything said by the other party, I suppose?

Mr. ROCHE. Yes, your Honor, that is what I mean.

A. No, sir." (Transcript of Record, pp. 53, 54, 446, 181, 182; Assignments of Error Nos. 34, 35.)

We contend that it was error for the trial Court to admit the above testimony as against the defendant Caminetti.

Testimony, as to utterances in a party's presence, is generally received on the theory that a failure to deny what is so asserted is an implied admission of the truth of the statement. But there is no ground for presuming acquiescence of such statements unless they are of such a character as would naturally call for a response, and unless the party, sought to be charged, was in such a situation that he would probably have replied to them.

Jones on Evidence, 291.

While a statement made in the presence of an accused is not admissible, as being itself evidence of any fact narrated therein, it is admissible primarily for the purpose of showing such conduct on the part of the accused as fairly implies assent.

"The conduct of the defendant is the gist of the inquiry, and it is the only matter to be considered and weighed by the jury. The statements of third persons are admitted only as pre-

liminary to the inquiry, and for the purpose of showing conduct.”

People v. Ah Yute, 54 Cal. 89;

People v. Mallow, 103 Cal. 513;

People v. Wong Lung, 159 Cal. 513;

Stowell v. Hall, 56 Or. 256; 108 Pac. 182.

We submit that the above testimony should not have been admitted.

But, being admitted, the cautionary instruction referred to in the subdivision of this Opening Brief, just preceding the one now under consideration, should at least have been given to the jury.

XX.

The Trial Judge Erred in His Rulings That the Prosecution Amounted Practically to one for a Conspiracy.

We have adverted to this feature of the case on several previous occasions in this Opening Brief, and we deem it unnecessary to present further argument in support of the proposition we maintain that the rulings of the trial Judge in this respect were deeply prejudicial to the defendant and were erroneous.

We refer to but two of several instances where the trial Judge ruled erroneously, as we contend.

“Q. Was Mr. Diggs the only man you had ever had intercourse with in your life?

A. Yes——

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Oh, I think it is a circumstance.

Mr. HOWE. We note an exception.

The COURT. She has answered the question.

Mr. ROCHE. Q. Where did that first act of intercourse take place?

A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *I don't see that that is material.*

Mr. ROCHE. Very well; I won't press it. I would like to ask just one question, though, with reference to that matter.

Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or rather, before that time, and upon that occasion, had you been furnished with any champagne?

A. Yes——

Mr. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Yes. I think so. *Well, I don't know about that. I will let the answer stand. The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances. Proceed.*

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time *although not in the same room.* Miss Norris was also in the office at the time, *although not in the same room.*” (Transcript of Record, pp. 252, 253; Assignment of Error No. 70, p. 66.)

Upon another occasion, the trial Judge again likened the prosecution to one for conspiracy, saying:

“The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. *In such a case it is very much like a prosecution for conspiracy, only here, of course, it is admitted simply because*

and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all, but it all goes to the jury for their consideration.

MR. WOODWORTH. *The point we make is that the defendant is indicted here simply for having violated the White-slave traffic Act. He is not indicted for conspiracy.*

THE COURT. Mr. Woodworth, I understand the situation thoroughly, and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

MR. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court." (Transcript of Record, p. 217; Assignments of Error Nos. 56, 57, 58, 59, pp. 62-63.)

We consider that much of the testimony, that was admitted under the guise that proof of the charges for a direct violation of the "White-slave traffic Act" practically involved a conspiracy, was very harmful to the defendant Caminetti. The trial Judge, throughout the trial of the case, was entirely too liberal in permitting of the admission of testimony and evidence on the part of the prosecution, and his rulings, in this connection, amounted to reversible error.

XXI.

The Trial Court Erred in Permitting the Witness W. E. Doan, Official Shorthand Reporter of the Superior Court of Sacramento, to Testify to Certain Admissions Made by the Defendant and by Lola Norris.

All of the exceptions taken to the rulings of the trial Judge in admitting and refusing to strike out the testimony of the witness W. E. Doan, which have been assigned as error, will be considered together.

The witness W. E. Doan was called on behalf of the prosecution. He testified that he held the position of official shorthand reporter of the Superior Court of Sacramento. He was permitted to testify, over the constant objections of counsel for the defendant, to certain statements made by the defendant to F. F. Atkinson, assistant district attorney of Sacramento County, while he was under arrest by the state authorities from Sacramento. The Transcript of Record, pages 330 to 335 inclusive, will disclose, more clearly than can be described in this brief, what really took place in Court in connection with the admission of the testimony of the witness Doan. At the conclusion of his *direct examination*, a motion to strike out the testimony of the witness was made. Again, at the close of all the testimony and before the case was submitted to the jury, a similar motion was made to strike out his testimony, both of which were denied. (See Assignments of Error Nos., 88, 89, 90, 91, 122, 123;

Transcript of Record, pp. 71, 72, 73, 82, 330-335, 336-356.)

It is contended that the trial Judge should not have permitted the introduction of the testimony of the witness Doan as to any statements or admissions claimed to have been made by the defendant Caminetti to the prosecuting attorney of Sacramento County; that is, under the circumstances developed by the evidence, these alleged statements or admissions of the defendant Caminetti should not have been permitted.

A reading of the testimony of the witness Doan discloses that these statements or admissions were elicited from the defendant to be used in certain prosecutions then pending in Sacramento against the defendant Caminetti and Lola Norris for violations of the state laws and not for violations of the "White-slave traffic Act". At the time that the statements or admissions were extracted from the defendant, he was not accused and was not under arrest for any violation of the "White-slave traffic Act", but had been arrested, and was then traveling in the custody of the police officers from Reno to Sacramento, upon warrants issued against him for violations of the laws of the State of California. This is made plain by the testimony of the witness Doan, as follows:

" 'Mr. ATKINSON. Mr. Caminetti, you know all these gentlemen, I guess, Mr. Doan, the Shorthand Reporter; you were introduced to the Chief of Police William Johnson of Sacramento, Detective Ryan of the Police Force, and

myself, Assistant District Attorney of the County of Sacramento, Atkinson. The officers *have warrants for you*, as you probably know, *warrants for your arrest*. *You have been charged* or will be charged with possibly two offenses; *one of contributing to the dependency of Miss Norris, a girl under 21 years of age, and with living in a state of adultery and cohabitation with her, you being married to some one else, and also a felony charge of deserting and abandoning your minor child*. You were brought back to this point from Reno by the officers, and we have come to talk with you about the matter before you reach Sacramento, ask you questions. You are not obligated to make any statement about the matter. Everything you say must be said freely and voluntarily and with a knowledge on your part that anything you say can and will be used against you in the event that judicial proceedings are taken against you on these charges, or any of them. You understand that, do you?

A. Yes, sir.

Q. *In other words, you know what your rights are?*

A. *Well, no.*

Q. Is there any question you want to ask me about them?

A. I would like to know the reason for you gentlemen coming up to meet us this morning?

Mr. ATKINSON. Two reasons. To talk to you before you reach Sacramento and before the newspaper reporters get hold of you, and also to forestall any scene or disturbance that might be created or had upon your arrival at Sacramento.

A. Mr. ATKINSON. I will ask you another question: *Do you think that I ought to say anything without first consulting an attorney?*

Q. *You are a man of discretion and you know what your rights are, and that sort of*

thing. You have already talked, as I have found. You suit yourself now.

A. I beg pardon, what was that?

Q. I say suit yourself.

A. Just before that?

Q. I say I understand that you have already talked about the episode.

A. Not to reporters.

Q. Well, to the others. I am going to ask you questions and you do as you see fit. You are 23 or 28?

*A. Let's see, I am 27, I believe.' * * **

"Mr. WOODWORTH. Q. The defendant was under arrest at that time, was he not, Mr. Doan?

A. I believe so." (Transcript of Record, pp. 336, 337.)

Therefore, at the time that the statements were elicited from the defendant Caminetti, he was under arrest and in the custody of police officers from Sacramento, and he was under arrest for violations of the laws of the State of California and *not of the United States*. He was under arrest and was being brought back to Sacramento upon warrants charging him with having abandoned or deserted his wife and children, and also with contributing to the delinquency of a minor, to wit, Lola Norris, who was then just under twenty-one years of age, both criminal offenses in California. He was not under arrest for any supposed violation of the "White-slave traffic Act". Indeed, the "White-slave traffic Act" was never, at any time, mentioned by any of the officials who arrested the defendant and who interrogated him. In fact, an infraction of the "White-slave traffic Act" was not even thought of at the

time. It was only after the return of the defendant Caminetti to Sacramento that a prosecution under the "White-slave traffic Act" was, *for the first time*, suggested or considered. *It was an afterthought.* All this is made clear by the uncontradicted testimony in the case. On cross-examination, Chief of Police Hillhouse of Reno testified as follows:

"I did not have any warrants for the arrest of these four people. I arrested them on word from the Chief of Police from Sacramento, a communication, a wire and telephone message. He said he had a warrant for them. He said for Mr. Diggs and Mr. Caminetti. I don't remember him saying anything about a warrant for the two ladies. Well, he told me to hold the four of them. That is, to arrest all four. He gave me no further instructions with reference to taking them to California, he just stated he had a warrant. I had nothing further than this telephone warrant. I simply got a telephone from the Chief of Police to arrest these two men and also to apprehend the girls. I don't just remember the charge. I don't know whether it was something like wife-abandonment or something like that. *I told them I had a communication from the Chief of Police in Sacramento to arrest them and hold them for wife abandonment.* Well, Mr. Diggs said all right, he didn't fear anything, he said. I don't remember just what the defendant said now. He didn't say very much at the time. *The White-slave traffic Act was not mentioned at all.*

"Mr. WOODWORTH. Q. *The White-slave traffic Act was not mentioned in any conversation you had with this defendant or with Mr. Diggs?*

"A. *It was not mentioned.'*"

* * * * *

“When they left Reno they were not in the custody of any one from my office. They were in the custody of Sacramento officers. The Sacramento officers had come for them. *They were not then in the custody of United States officers.*” (Transcript of Record, pp. 220-222.)

From the above references to the testimony, it appears, (1) that the defendant, at the time of the making of the statements, was under arrest and in the custody of the police officers from Sacramento; (2) that he was under arrest by virtue of warrants issued by the state authorities at Sacramento for violations of the state laws; (3) that he was not under arrest at that time because of any warrant issued by the federal government for any violation of the “White-slave traffic Act”; (4) that, at that time, no prosecution by the federal government for any violation of the “White-slave traffic Act” had been initiated or any warrant of arrest issued, nor was the defendant informed of any possible prosecutions under the “White-slave traffic Act”; (5) that the statements were elicited from the defendant by F. F. Atkinson, the assistant district attorney from Sacramento, who, it appears, accompanied the police officers from Sacramento as their legal adviser in supervising the arrest of the defendant and compelling his speedy return, in the custody of the officers, from Reno, State of Nevada, to Sacramento, State of California.

Under this state of facts, we respectfully contend that any statements or admissions elicited from the

defendant by Assistant District Attorney Atkinson were inadmissible in an entirely different prosecution, and in a different Court and jurisdiction. Assuming, but not conceding, that the statements or admissions of the defendant would have been admissible in any prosecution for violations of the state laws, for which the defendant had been arrested and brought back to Sacramento, we contend that such statements or admissions should not have been admitted in a prosecution of an entirely different nature and of which the defendant, at the time of the making the statements or admissions, was not apprised and was in complete ignorance.

In other words, statements or admissions cannot be elicited from a defendant in one proceeding and upon a certain charge and then an attempt made to use those statements or admissions against the defendant in an entirely different proceeding and upon an entirely different charge and in a different Court and jurisdiction unless the defendant is fully and fairly informed of such purpose and threatened danger. The law will not permit of such jugglery, nor will it sanction such a subterfuge and fraud upon the rights of one accused of crime. It is elementary law, that statements, admissions or confessions, to be admissible, must be voluntary and free from fraud or duress, and no unfair advantage must be taken of the accused person. We can conceive of no greater fraud or of a more unfair advantage practiced upon a person under arrest upon one charge than to elicit statements or admissions

from him for the purpose, ostensibly, of using them against him, and then to employ them on another and an entirely different charge, not then in existence but to be instituted thereafter in an entirely different Court and jurisdiction. Yet, such is the result of the situation developed by the evidence in the case at bar. The defendant is arrested at Reno by police officers from Sacramento, who are accompanied by an assistant district attorney from Sacramento acting as the legal adviser of the police officers, and intent bent that no legal obstacle should prevent the return of the defendant in the custody of the police officers from Reno to Sacramento. While the defendant is actually traveling on a train from Reno to Sacramento, and in the custody of the police officers and constantly under their surveillance, the assistant district attorney from Sacramento undertakes to subject him to a searching cross-examination and takes the precaution of having the answers and questions taken down by the official shorthand reporter of the Superior Court of Sacramento. He not only thus examines the defendant and reduces all his statements to writing so that they can be preserved and used against him, but he pursues a similar course with reference to Lola Norris. Not content with that course of conduct, he goes even to the extent of at times examining the defendant alone and separately and without the presence of Lola Norris and then, upon other occasions, when it suits his purpose, he confronts

one with the other and repeats such statements to them, as he regards of an incriminatory nature, expecting, undoubtedly, to trap the defendant and Lola Norris into irreconcilable contradictions, or, as to some other matters, hoping that they might confirm, in each other's presence, some fact which he regards as particularly derogatory and incriminatory. We hazard the assertion that had the above statements or admissions of the defendant been offered in the state Court at Sacramento in the very prosecution for violations of the state laws for which the defendant was then under arrest and in custody, and to which his examination by the assistant district attorney of Sacramento was then directed, their offer would have been promptly excluded. In no event would the statements or admissions of the defendant have been admissible in the state Court under the state law.

Section 1324 of the Penal Code of the State of California, as amended March 24, 1911 (Stats. 1911, p. 485), provides:

“A person hereafter offending against any of the provisions of this code or against any law of this state, is a competent witness against any other person so offending, and may be compelled to attend and testify and produce any books, papers, contracts, agreements, or documents upon any trial, hearing, proceeding or lawful investigation or judicial proceeding, in the same manner as any other person. If such person demands that he be excused from testifying or from producing such books, papers, contracts, agreements or documents, on the

ground that his testimony or that the production of such books, papers, contracts, agreements or documents may incriminate himself, he shall not be excused, but in that case the testimony so given and the books, papers, contracts, agreements and documents so produced shall not be used in any criminal prosecution or proceeding against the person so testifying, except for perjury in giving such testimony, and he shall not be liable thereafter to prosecution by indictment, information, or presentment, or to prosecution nor punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter or thing concerning which he may have testified or produced evidence, documentary or otherwise.

No such person shall be exempt from indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, or for or on account of any transaction, matter or thing concerning which he may have testified as aforesaid, or produced evidence, documentary or otherwise, where such person so testifying or so producing evidence, documentary or otherwise, does so voluntarily or when such person so testifying or so producing evidence, fails to ask to be excused from testifying or so producing evidence, on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself, but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any criminal prosecution or proceeding against the person so testifying or producing such evidence, documentary or otherwise.

Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this

section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony or the production of such evidence, documentary or otherwise, may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify, or for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, upon such trial, hearing, proceeding or investigation."

Under the above section, were this a prosecution in the state Court, the statements or admissions made by the defendant Caminetti to F. F. Atkinson, the assistant district attorney of Sacramento County, would not be admissible for the reason that the assistant district attorney did *not read this section of the code to the defendant* before interrogating him and obtaining his statements or admissions. The state code provision is mandatory in this respect.

Not being admissible under the laws of the State of California, we contend that the statements or admissions were likewise not admissible in the prosecution in the federal Courts for a violation of the "White-slave traffic Act".

It is well settled that the state laws of evidence are rules of decision on trials at the common law in the United States Courts.

Hinds v. Keith, 57 Fed. 10; 3 U. S. App. 222;
Ryan v. Bindley, 68 U. S.; (1 Wall) 66, 17
L. Ed. 559.

There is no pretense that the assistant district attorney of Sacramento complied with the state statutory requirement and read section 1324 of the Penal Code of the State of California to the defendant. Failing to do so, the statements or admissions obtained by such prosecuting officer could not afterwards be used against him in the state Courts, and, we contend, were equally inadmissible against him in the federal Courts. .

Failure by the assistant prosecuting attorney of Sacramento to rigidly observe the requirements of section 1324 of the Penal Code, in not reading that section to the defendant, rendered the statements, admissions, or confession, claimed by the prosecution to have been made by the defendant, inadmissible.

In the State of Texas, there is a somewhat similar provision.

Texas Code Cr. Pro., sec. 790, provides:

“A confession shall not be used, if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in the custody of an officer, unless such confession be made in a voluntary statement of the accused taken before an examining court in accordance

with law, or be made voluntarily, after having been first cautioned that it may be used against him, or unless in connection with such confession he makes statements of facts, or of circumstances, that are found to be true, which conduces to establish his guilt—such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.”

Applying this statute, in the case of *Morales v. State*, 36 S. W. 435, it was held to be error to permit the sheriff to testify that defendant, *while in jail*, had made the statement that “he killed deceased for his money, but that he did not get any”, the requirements of that statute not having been observed.

The same rule was upheld and followed in the case of *Wright v. State*, 37 S. W. 734.

The general observations made by the Supreme Court of the United States, in the recent case of *Weeks v. United States*, 34 Sup. Ct. Rep. 341, 344, are pertinent. Speaking through Mr. Justice Day, the Supreme Court said:

“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”

Without further elaborating upon this proposition, we submit:

First: That inasmuch as the statements or admissions would be inadmissible in the state Courts because of the failure of the assistant prosecuting attorney of Sacramento to read section 1324 of the Penal Code of the State of California, they are equally inadmissible in the federal Courts.

Second: That the statements or admissions were not voluntary or free from fraud, and that an undue advantage was taken of the defendant, for the reason that when the statements or admissions were obtained from him he was not informed or advised that they were likely to be used in a prosecution against him for a violation of the "White-slave traffic Act". In other words, the statements or admissions were obtained from him under the guise and pretense that they might be used against him in certain prosecutions then pending against him in the state Courts of Sacramento upon charges entirely different from those afterwards instituted against him in the federal Courts for violations of the "White-slave traffic Act". The defendant should have been fully instructed by the assistant district attorney of Sacramento County that the statements or admissions then and there made by him might be used against him in a prosecution in the federal Courts for violations of the "White-slave traffic Act". This, confessedly, was not done. In fact, the evidence justifies us in saying that the prosecution in the federal Courts for violations of the "White-

slave traffic Act" were not even dreamt of at the time the statements or admissions were extracted from the defendant and that his subsequent arrest and turning over to the federal authorities was a mere afterthought.

Third: Finally, we submit that the entire investigation or examination held by the assistant district attorney of Sacramento County was highly improper and constituted a gross violation of the defendant's constitutional right not to be compelled to incriminate himself. The character of the examination, the manner in which it was held, the then situation of the defendant under arrest and in custody, the situation likewise of Lola Norris, who, if not then under actual arrest, was under surveillance and constant menace of arrest, the insistency of the assistant prosecuting attorney in plying questions to the defendant and to Lola Norris when both had expressed a disinclination to talk, and the controlling and all-important fact that the defendant was never apprised by any one of any impending prosecution for violations of the "White-slave traffic Act", such a matter not even being discussed, justify us in contending that the trial Judge committed serious error, to the prejudice of the defendant, in admitting any of the statements or admissions of the defendant obtained from him under the circumstances disclosed in the case at bar, and we respectfully submit that our numerous objections to the admission of this class of evidence should have been

sustained and our motions to strike out the evidence granted.

It is interesting to note, in this connection, that under the provisions of section 860 of the Revised Statutes, the statements or admissions of the defendant would have been excluded, for that section provided:

“No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture.”

It is true that this section of the Revised Statutes was repealed by the Act of Congress of May 7, 1910 (Stats. at Large, vol. 36, page 352). But the repeal of this section of the Revised Statutes did not operate also to deprive one accused of crime of his paramount constitutional right not to be compelled to incriminate himself or to be a witness against himself. The fundamental and sacred constitutional rights surrounding persons accused of crime, which have for their mighty object the protection of the innocent, still remain in force, and the well settled rules of law and evidence relating to and governing the admissibility of statements or admissions or confessions of one accused of crime remain the same; that is, they must be voluntary; they must be free from trick or fraud; they must be fairly obtained and no undue advantage taken of one ac-

cused of crime; they must be open and above-board and not the result of ruse, or of artifice, or of chicanery; the person accused of crime must be fully and fairly warned and advised of his rights and of what he is accused, and the statements cannot be extracted from him under the guise and subterfuge that he is to be prosecuted for one offense only to find later on that he is being prosecuted for another offense, to which his attention was never called or of which he was totally ignorant at the time the statements, or admissions, or confession, were obtained from him.

It being established that the rulings of the Court below were erroneous, the legal presumption is that error produces prejudice.

Pettibone v. Territory of New Mexico, 201 Fed. 492.

The use made of statements or admissions, or a confession obtained from a defendant, precludes the prosecution from contending that it was not to his prejudice.

Bram v. U. S., 168 U. S. 532; 42 L. Ed. 568.

XXII.

The Trial Court Erred in Refusing to Permit the Attorney for the Defendant, in His Opening Statement to the Jury, to Read Those Portions of the "White Slave Traffic Act", Under Which the Defendant Was Indicted and Was Then on Trial, and in Refusing to Permit the Indictment to be Read to the Jury, and in Making Prejudicial Remarks in His Rulings in That Connection.

(Transcript of Record, pp. 74, 357, 358, 359; Assignments of Error Nos. 92, 93, 94.)

In order better to appreciate the force of our contention in this regard, it will be necessary to set forth just what transpired in Court during the opening statement.

"MR. WOODWORTH. If your Honor please, and gentlemen of the jury, in order that you may better appreciate and understand the evidence to be presented here in the defense of the defendant, I will state very briefly the character of his defense and the testimony which he expects to present in support of that defense. As you know, the defendant is indicted for a violation of the White Slave Traffic Act. That is the name given to the statute itself by Congress; we expect to show you that the defendant is not guilty of any act of white slavery, or of any act of commercialized vice, or——

THE COURT. Now, Mr. Woodworth, state your facts to this jury and leave your comments upon the law until a later time, *if you are permitted to make any*. Just state the facts you propose to prove.

MR. WOODWORTH. It is proper for us to state, I take it, that we propose to show that

under no phase of the evidence adduced by the Government is the defendant guilty of white slavery——

The COURT. All you can do now is to state what you expect to prove. The other matter is a matter of argument.

Mr. WOODWORTH. Very well, your Honor.

We expect to show, with great confidence, gentlemen of the jury, and upon the evidence that we will produce here which will convince you, that the defendant is not guilty of any of the accusations which have been made against him in the four counts of the indictment.

And so that you may better understand and appreciate the effect or force of the evidence to which I will refer, I deem it my duty at this time to read the two sections of the law upon which this defendant is indicted and to——

Mr. ROCHE. We object to that, your Honor.

Mr. WOODWORTH. *What, you object to the jury knowing what the law is?*

Mr. ROCHE. We desire to object to counsel reading the law to the jury.

The COURT. *Counsel knows that he can not do it.*

Mr. WOODWORTH. I think we can, your Honor. I think that that course is well settled here. I know that it is in my experience here, I can call the law to the attention of the jury.

The COURT. You will confine yourself to a statement of what you expect to prove.

Mr. WOODWORTH. We take an exception to the refusal of the Court to permit me to read the Statutes to the jury, the Statutes upon which the defendant is indicted.

The COURT. *You will conduct your case in the usual and orderly and proper manner.*

Mr. WOODWORTH. I think I am, if your Honor please, and we except to the ruling of the Court, respectfully, of course.

So that you may understand the evidence we propose to present here, I will now take up the indictment and refer to the different charges that have been made against the defendant. The first count of the indictment charges that the defendant on the 15th day of January——

The COURT. *Mr. Woodworth, I shall ask you again for the last time to confine yourself to a statement of the evidence. I will state to the jury what the indictment contains, and I will state to them the law that they must be governed by.*

MR. WOODWORTH. We desire the record to show that it is necessary for an intelligent opening statement of the character of proof which we propose to present, to refer to the accusations of the indictment and to the different elements, so that the jury may follow the proof.

The COURT. *I don't object to your doing that, but you must not read the indictment to the jury.*

MR. WOODWORTH. Can I not state the elements of the offense then proceed with a statement of the proofs we expect to produce?

The COURT. *I desire to warn you again to proceed and make your statement to the jury, if you have any statement to make, and make it in a proper and orderly manner.*

MR. WOODWORTH. We take an exception to the ruling of the Court. We would like to read the indictment to the jury so that they will understand the proofs." (Transcript of Record, pp. 357-359.)

Thereafter, in his opening statement to the jury, Mr. Woodworth was compelled to rely entirely upon his memory in stating to the jury the different charges contained in the four counts of the indictment, upon which the defendant was then on trial,

and in adverting to the different elements going to make up the charges contained in the four counts of the indictment, and with reference to which evidence had been offered by the prosecution, and the defense was then endeavoring to explain to the jury what evidence would be offered on its side.

We respectfully submit that the action of the trial Judge was unfair to the defendant, and that it prevented his attorney from making such a full and complete opening statement to the jury as would have clearly apprised the jurors of the character of evidence the defendant expected to adduce in meeting the various ingredients or elements of the offenses charged against him in the four counts of the indictment. We further contend that the remarks of the trial Judge, addressed to the attorney for the defendant who was endeavoring to make an opening statement to the jury, were uncalled for by anything that had transpired at the time and were calculated to prejudice the defendant's cause in the eyes of the jury.

We respectfully submit that the attorney for the defendant, making the opening statement, was entitled, and should have been permitted by the trial Judge, to read to the jury those sections of the "White-slave traffic Act" under which the defendant had been indicted and was then on trial, and he should also have been allowed to read to the jury the indictment in the case.

The rule is stated in Cyc., vol. 12, page 583, as follows:

“Counsel may, even where the jury must accept the law as laid down to them in the judge’s charge, refer to and explain the law of the case in his argument.”

See also,

McQueen v. State, 103 Ala. 12; 15 So. 824;
Warmock v. State, 56 Ga. 503;
Com. v. Porter, 10 Metc. 263;
McLain v. State, 18 Nebr. 154, 24 N. W. 720;
Hannah v. State, 11 Lea 201.

Again the rule is stated in Cyc., vol. 12, page 583, as follows:

“The statute under which the prosecution is had may be read, although it is not in evidence.”

See, also,

Com. v. Hill, 145 Mass. 305; 14 N. E. 124;
Com. v. Austin, 7 Gray (Mass.) 51;
People v. Ringsted, 90 Mich. 371; 51 N. W. 519;
State v. Dent, 170 Mo. 398; 70 S. W. 881;
State v. Morse, 66 Mo. App. 303;
State v. Sartor, 2 Strobb. (S. C.) 60.

The rule is also stated in Cyc., vol. 12, page 573, as follows:

“It is proper to read the indictment to the jury, if this is done in good faith and for the purpose of stating what the prosecution intends to prove.”

See, also,

Greenwood v. Com., 11 S. W. 811; 11 Ky. L. Rep. 220;

State v. Desroches, 48 La. Ann. 428; 19 So. 250;

State v. Pennington, 124 Mo. 388; 27 S. W. 1106;

People v. Reilly, 164 N. Y. 600; 59 N. E. 1128 (affirming 49 N. Y. App. Div. 218; 63 N. Y. Suppl. 18, 14 N. Y. Cr. 458).

The trial Judge should have permitted the attorney for the defendant, in his opening address to the jury, first to read the sections of the "White-slave traffic Act" under which the defendant was indicted, and then the indictment upon which he was being tried.

It must be remembered that the offenses for which the defendant was indicted and was then on trial were not the ordinary or common law crimes, such as robbery, larceny, murder, rape, arson, etc., etc., offenses whose character are well known to every person, but the defendant was indicted for the violation of a statutory offense, the elements of which were of a special nature. Before a defendant could be convicted under section 2 of the "White-slave traffic Act" it was necessary for the prosecution to allege and to prove: (1) a transportation in interstate commerce; (2) a transportation in interstate commerce of a woman or girl; (3) a transportation

for the purpose of prostitution or debauchery, or for any other immoral purpose (practice); (4) or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice. These were the elements to be alleged and proved under the first count of the indictment. The remaining three counts of the indictment, charging violations of section 3 as well as 2 of the "White-slave traffic Act", were equally involved. No defendant could be convicted unless all of these elements or ingredients of this statutory offense charged were proved beyond all reasonable doubt. It is obvious, therefore, that the trial Judge should have permitted the attorney for the defendant, in his opening statement to read to the jury these two short sections (2 and 3) of the "White-slave traffic Act" under which the defendant was indicted, so that the jury could better appreciate and understand the statement of the attorney for the defendant as to what was intended to be proved in exculpation of the defendant. The Bill of Exceptions fails to disclose that the statute under which the defendant was indicted, that is, sections 2 and 3 of the "White-slave traffic Act", were ever read to the jury at any previous stage of the proceeding. It is likewise true that the indictment in the case had not been read to the jury. No one will deny that it would have conduced to an unmistakably clearer understanding by the jury of what the de-

fendant expected to prove in his defense had sections 2 and 3 of the "White-slave traffic Act" been read to the jury by the attorney for the defendant in his opening statement and then followed it up with a reading of the indictment, containing four counts, and which was exceedingly brief. The statute and the indictment contained the cardinal points of the case and the jury was entitled to know just what the "White-slave traffic Act" prohibited. Likewise were they entitled to know, *if not at the outset of the case for the prosecution*, certainly at the outset of the case for the defendant, just what the allegations of the four counts of the indictment contained, so that they might the better understand the evidence to be presented on the part of the defendant and to do more equal justice between the prosecution and the defendant.

For the trial Judge to have denied the attorney for the defendant the right to read the statute and the indictment, under which the defendant was indicted, was, under the circumstances disclosed in the record, we submit, reversible error.

Furthermore, we complain, respectfully, that the language employed by the learned trial Judge, in refusing to permit the attorney for the defendant to read the statute and indictment, was especially harmful and prejudicial to the cause of the defense. Such remarks or comments by the Court as: "*Counsel knows that he can not do it*"; "*You will conduct your case in the usual and orderly and*

proper manner”; “Mr. Woodworth, I shall ask you again *for the last time* to confine yourself to a statement of the evidence”; “I desire to warn you again to proceed and make your statement to the jury, *if you have any statement to make*, and make it in a *proper and orderly manner*” (Transcript of Record, pp. 357-359), were, we submit, improper and prejudicial.

A perusal of the record will disclose that there was nothing in the statements of the attorney for the defendant—the language he employed in addressing the Court or the jury—which merited the severe admonitions and sharp reproofs of the trial Judge. The record shows that the attorney for the defendant was not making an attempt to argue on the law, or to argue upon and review the testimony already offered by the state, or to argue upon his own facts (Cyc., vol. 12, p. 571).

He was simply attempting to read to the jury those provisions of the statute under which the defendant was indicted and the indictment upon which he was then on trial, and he asked the privilege of doing this, so that the jury might better understand the proofs to be offered in behalf of the defendant. We respectfully submit that the trial Judge should have permitted him to do this, and should not have indulged in the severe admonitions and sharp rebukes disclosed by the record.

Accused, charged with a criminal offense, is not only entitled to have questions of law properly de-

cided, but to have his counsel fairly treated, and questions resting more or less in the discretion of the trial judge reasonably disposed of, and to have the Court, however unintentionally, show no spirit of hostility or discrimination against accused and in favor of the people.

People v. Becker, vol. 104, N. E. Rep. 396,
402, 404.

The situation developed in the case, just cited, of People v. Becker, seems peculiarly applicable to the case at bar, in view of the attitude and demeanor of the trial Judge throughout the entire case. The Court of Appeals of New York, in commenting upon the attitude and demeanor of the trial Judge in the case cited, used the following significant and expressive language:

“It may be stated very briefly but accurately that repeatedly without any objection, complaint, or request by the very able and alert district attorney, the court on its own motion criticised the defendant’s counsel for some little peculiarity in the form of his questions which was utterly innocuous; intervened to protect the people’s witnesses on cross-examination; objected to and excluded questions asked by defendant’s counsel; and on one occasion, when such counsel asked if the district attorney would concede a fact about which apparently there was no dispute, the court ruled for the district attorney, ‘No, I will not let him concede it.’

“At times on making an objection or asking a question, which does not appear from the record to have been contumacious or ridiculous, or an attempting to make a suggestion or give a reason in what seems from the record to have been

a respectful manner, defendant's counsel was told that he was 'becoming trivial', and commanded to 'sit down', or, 'Mr. McIntyre, you know better than to object', or that, 'there is no necessity of being so explosive about it', or, 'Now wait, stop that manner', or 'You will save time by not indulging in so much talk', or, 'No argument'. Perhaps in the interest of exactness we are justified in quoting two passages, the first of which occurred on the cross-examination of the people's important witness Luban: 'The Court. This has been all gone over. I will declare this examination closed if there be no further question. The witness has been under cross-examination for two hours and a quarter. Mr. McIntyre. I can't help it, your Honor. The Court. It will be helped unless you put the question. No discussion at all. I have told you what I will do.' In the other case, when defendant's counsel addressed to the witness a question, the following occurred: 'The Court. How is that material? Mr. McIntyre. I am going to show that there was a conversation. The Court. Not what you are going to show. * * * Mr. McIntyre. I wanted to show that there was opportunity to conspire and confer. The Court. Come to order. I shall not hear what you wanted to do. I will only hear questions. Mr. McIntyre. Your Honor asked me how it was material? The Court. I asked the district attorney.' The district attorney had taken no part in the incident. At other times haste seemed to become the essence of the trial, and defendant's counsel on asking some question or requesting some not unusual indulgence were harshly admonished to, 'Get along', or, 'Go along', or, 'Time is too precious'. On one occasion when the leading counsel for defendant pleaded weariness and asked that his associate might take his place in the cross-examination of a witness, the request

was summarily denied. On another occasion it was proposed as an apparent reason for denying counsel's request for an adjournment that the cross-examination be turned over to his associate. With one exception, so far as we are able to discover, every appeal by defendant's counsel to the discretion of the Court for an adjournment, for the very common leave to reopen the examination of a witness in order to correct some inadvertent omission or utilize on cross-examination of a hostile witness some newly-acquired information or to call a witness who had been absent was denied, whereas applications of a similar character on the part of the people were quite uniformly granted.

"A witness named Shea was an important one for the defense, and he was cross-examined at considerable length by the people. At the close of such cross-examination the following occurred: 'Mr. Hart (defendant's counsel). I just want to ask one question. The Court. No. Call your next witness. Mr. McIntyre. We desire to call the witness for several questions. The Court. I shall not permit you. Time is too precious.' It was no exception that the district attorney, without objection or criticism, was allowed a redirect examination of his witnesses.

"At the close of the original examination of Schepps, the following occurred: 'Mr. McIntyre. I don't think I can conduct the cross-examination any further on the main issue. I am too exhausted, I am too tired. The Court. Let us have no more about exhaustion. We have heard enough about that. The Court. * * * Have you another witness waiting, Mr. District Attorney? Mr. Whitman. Mrs. Rosenthal has been waiting all day. * * * She appears to be exhausted. I will call her if your Honor thinks best. Her examination will take some time. Mr. McIntyre. I join in the request. Won't your Honor please adjourn to-night? The Court. Yes.' "

XXIII.

The Trial Court Erred in its Rulings and in its Comments and the Prosecuting Attorneys Likewise Erred in the Questions Propounded and the Comments Made by Them, With Reference to the Alleged Conduct of the Defendant Caminetti With Certain Girls Other Than Lola Norris and Marsha Warrington.

The attorneys for the prosecution repeatedly endeavored to inject into the case the alleged relations of the defendant Caminetti and of Maury I. Diggs (who was not a defendant in this case) with certain girls other than Lola Norris or Marsha Warrington. They repeatedly asked questions designed to elicit such testimony. They intimated time and again that the defendant Caminetti had sustained illicit relations with girls other than Lola Norris. They referred to certain "telephone girls". Their conduct, in this connection, was assigned as misconduct and exception taken thereto as well as to the rulings of the Court in permitting questions of such character to be asked and in not rebuking the prosecuting attorneys for propounding such interrogatories and making such comments.

(Transcript of Record, pp. 75, 76, 77, 81, 370-371, 373-374, 376-377; Assignments of Errors Nos. 97, 98, 99, 101, 102, 103, 104, 105, 106, 118, 119).

The questions, rulings and comments, to which exceptions were reserved, are as follows:

During the cross-examination of D. T. Leitch, a witness called on behalf of the defense, the following took place:

"They said something about some stagehands or something having some business with telephone girls, or something to that effect. I don't know just what they did say on that. Something about stagehands doing something, that was the way Diggs answered it. I don't know whether they were telephone girls or what they might be. I first read in the papers somewhere a reference made to telephone girls. I never talked about telephone girls that were going to Diggs' office in the conversation I had with Caminetti in the machine. I don't know that Caminetti referred to telephone girls that were going to Diggs' office in the conversation I had with him. I knew that he knew a telephone girl. I did not know her in Diggs' office. I did not know at that particular time, the early part of March, 1913, that Caminetti was accustomed to bringing telephone girls to Diggs' office. No.

Mr. HOWE. Just a moment. He says No.

The COURT. This is *not* cross-examination.

Mr. SULLIVAN. I want to show that this conversation between Diggs and Diepenbrock referred to certain telephone girls that were accustomed to being brought to Diggs' office by Caminetti.

Mr. HOWE. We object to that as immaterial, irrelevant and incompetent and not cross-examination, and *we assign it as misconduct on the part of the attorney for the Government.*

The COURT. Oh, no, don't indulge in suggestions of that kind. There is nothing in it.

Mr. HOWE. We note an exception.

The COURT. He has a right to find out what the conversation was about. This *is* cross-examination." * * *

"Q. Did he not in that conversation in the automobile say that the mother of a certain young girl in Sacramento had made complaint against him in the Juvenile Court.

A. No, he never said that.

Q. Did he not say that complaint had been filed against *Diggs* by the mother of a certain young girl in Sacramento, in the Juvenile Court?

A. No.

Mr. WOODWORTH. We object to that *and assign that as error*.

He did not mention the names of the girls in that conversation. I never knew of his going with any girls but these two girls. He did not mention any names." (Transcript of Record, pp. 370-371; Assignments of Error Nos. 97, 98, 99, p. 75.)

During the cross-examination of C. L. Avery, a witness called on behalf of the defense, the following occurred:

"Q. Wasn't he suspended in June and July, 1912, on account of an escapade in which he and Diggs and two young girls participated?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not proper cross-examination.

The COURT. Oh, yes, you asked him about the entire period of his employment.

Mr. HOWE. We note an exception.

A. I could not testify to that. I only know—that is, I don't know, but I am led to believe, that that is the case." * * *

"Q. In June or July, 1912, did not Mr. Caminetti tell you about the circumstances which led to his suspension?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not cross-examination.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. No.

Mr. SULLIVAN. Q. Did anyone tell you in the presence of Caminetti about the circum-

stances which led to his suspension by the Board of Control?

Mr. HOWE. The same objection.

The COURT. The same ruling.

Mr. HOWE. We note an exception.

A. I think I overheard some comments made in the office, but no one told me directly.” (Transcript of Record, pp. 373, 374; Assignments of Error Nos. 101, 103, p. 76.)

During the cross-examination of Thomas J. Ford, a witness called on behalf of the defense, the following occurred:

“Q. You remember the fact that he was suspended by the Board of Control in June or July, 1912?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. Well, I remember of him being suspended, but I cannot say that it was at that particular time.

My recollection is that he was suspended once.

Mr. SULLIVAN. Q. Do you remember on one occasion when he took a trip to Oakland in a machine, an automobile, and did not show up for quite a while at the office?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent and it is too indefinite.

Mr. SULLIVAN. That is a preliminary question. I will follow it up with another question.

The COURT. Well, I will see what it leads to. Answer it, if you remember it.

Mr. HOWE. We note an exception.

A. I have not had any knowledge of that except through general rumor.

I have no knowledge of that from what he told me. I cannot recall that I have any knowledge of that from what was said about it in the presence of Caminetti in the office of the Board of Control or elsewhere.

Q. Did you speak to him about a certain trip that he took in a machine from Sacramento to Oakland?

Mr. HOWE. The same objection, it is too indefinite as to time.

The COURT. The witness has testified upon your questioning about making some strictures to the defendant which caused him to melt into tears, and I think they have a right to ask him what he said to him.

Mr. HOWE. We note an exception.

A. No. He spoke to me about it. He spoke to me about a certain trip. I don't know when he did speak to me about it. It seems to me it was the day he got home. He spoke about being dead on his feet, that he had been riding all day.

He did not say he had gone to Oakland to see about a certain girl who was there with whom he had relations, nor did he tell me why he went to Oakland. After making that trip to Oakland he did not tell me that he had put one over on Jack Neylan, the President of the Board of Control. He did not tell me why he went to Oakland on that trip." (Transcript of Record, pp. 376-377; Assignments of Error Nos. 104, 105, 106, pp. 77, 78.)

We contend that the objections to the above questions should have been sustained and the prosecuting attorneys should have been rebuked by the trial Judge for constantly and persistently bringing to the attention of the jury the alleged improper rela-

tions, not only of the defendant Caminetti, but of Diggs, with certain "telephone girls", girls other than Lola Norris or Marsha Warrington. The entire proceeding, in this regard, was highly prejudicial to the defendant Caminetti. It will be noticed that, in the cross-examination of the witness Leitch, the Court first ruled that any inquiry as to whether Caminetti was accustomed to bringing "telephone girls" to Diggs' office, was "*not* cross-examination", and then immediately thereafter, upon the senior prosecuting attorney stating to the Court: "I want to show that this conversation between Diggs and Diepenbrock referred to certain telephone girls that were accustomed to being brought to Diggs' office by Caminetti", reversed his ruling and held that: "*This is cross-examination.*" (Transcript of Record, pp. 370-371.)

Furthermore, the trial Judge permitted a question to be asked as to whether Caminetti did not say that a "complaint had been filed against *Diggs* by the mother of a certain young girl in Sacramento, in the Juvenile Court", to which counsel for the defendant objected and assigned the asking of the question as error. (Transcript of Record, pp. 370-371.) It was manifestly improper to permit any questions to be asked with reference to alleged improper relations between Diggs and some women other than Lola Norris and Marsha Warrington. The defendant certainly could not be held responsible for the conduct of Diggs. He was on trial for his own conduct with Lola Norris and Marsha War-

rington with reference to the "White-slave traffic Act", and he was not on trial as to any other women, whether "telephone girls" or otherwise. To permit the slightest intimation to be injected into the case by the attorneys for the prosecution of the defendant's supposed relations, or of Diggs' alleged relations, with other women was highly improper and was prejudicial error.

In a previous portion of this Opening Brief, under the Sixth subdivision thereof, we pointed out that, in prosecutions of the character involved in the case at bar, it is not permissible to admit evidence of the misconduct of the defendant with females other than the one with reference to which he is charged, and we again advert to the argument there advanced and the law and authorities cited in support of the assignments of error here urged. (See pages 207-248 of this Opening Brief.)

See also, on this subject of the rulings of the trial Judge, the case of

People v. Becker, 104 N. E. 396, 402-404.

XXIV.

The Trial Court Erred in Refusing to Permit the Defendant to Testify That He Had Never Read the "White Slave Traffic Act".

(Transcript of Record, pp. 81, 82, 407; Assignments of Error Nos. 120, 121.)

We contend that the question was a proper and material one in a case like the present, involving proof of a specific intent before the defendant can be convicted. The pivotal point in the case was as to the intent and purpose of the defendant in leaving Sacramento with Lola Norris. The "White-slave traffic Act" requires the existence of a specific intent or purpose. The prosecution was in duty bound to establish this specific intent or purpose to the satisfaction of the jury beyond all reasonable doubt. The contention, advanced in support of the defense was that the defendant did not leave Sacramento with Lola Norris to go to Reno, Nevada, in interstate commerce, with the intent or purpose denounced by the "White-slave traffic Act" and alleged against him in the indictment. As the intent required by the "White-slave traffic Act" is a specific intent, the attorneys for the defendant attempted to show that the defendant could not have had the specific intent denounced by the "White-slave traffic Act" inasmuch as, among many other reasons, he had never read the "White-slave traffic Act", nor was he familiar with any of its provisions, nor had he ever heard, up to the time of his

arrest by the federal authorities, of the existence of such a law. While we concede that "it is a well-settled principle that everyone is presumed to know the law of the land, both common law and statutory, and that one's ignorance of the law furnishes no exemption from criminal responsibility for his acts", still it is equally well settled that

"an *exception* to the general rule exists where a *specific intent is essential to a crime*, and *ignorance of law negatives the existence of such an intent.*"

Cyc., vol. 12, pp. 152, 155, 156;

Com. v. Stebbins, 8 Gray (Mass.) 492;

People v. Husband, 36 Mich. 306;

Rex. v. Hall, 3 C. & P. 409; 14 E. C. L. 635.

In this connection, we also contend that the trial Judge committed reversible error in refusing to give the following instruction requested on behalf of the defendant:

"The Court instructs the jury that where a defendant is charged with the violation of a statute which expressly requires, in order to render an act punishable, that it should be done with a specific intent or purpose or state of mind, if from ignorance of law, or from any other reason that specific intent does not exist, there is lacking one of the elements of the crime, and if you find from the evidence in this case that through ignorance of the law the defendant did not have that specific intent and state of mind charged in the indictment, it is your duty to acquit him regardless of how you view his conduct otherwise." (Transcript of Record, pp. 102, 452; Assignment of Error No. 162.)

XXV.

The Trial Court Erred in Permitting Marsha Warrington to Testify as to Her Acts of Sexual Intercourse With Maury I. Diggs, With Which the Defendant Caminetti, as Disclosed by the Evidence, Had Nothing Whatever to do and Was Not Even Aware.

(Transcript of Record, pp. 66, 67, 252, 253, 254; Assignments of Error Nos. 69, 70, 71).

We set out the objectionable questions and the testimony elicited thereby.

“Q. Was Mr. Diggs the only man that you ever had intercourse with in your life?

A. Yes——

MR. HOWE. That is objected to as immaterial, irrelevant and incompetent.

THE COURT. Oh, I think it is a circumstance.

MR. HOWE. We note an exception.

THE COURT. She has answered the question.

MR. ROCHE. Q. Where did that first act of intercourse take place?

A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

MR. HOWE. That is objected to as immaterial, irrelevant and incompetent.

THE COURT. I don't see that that is material.

MR. ROCHE. Very well; I won't press it. I would like to ask just one question though with reference to that matter.

Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or rather, before that time, and upon that occasion, had you been furnished with any champagne?

A. Yes.

MR. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *Yes; I think so. Well, I don't know about that. I will let the answer stand.* The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances. Proceed.

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time although not in the same room. Miss Norris was also in the office at the time although not in the same room.

Q. Did the four of you participate, or did the four of you partake of these wines?

A. Yes.

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

Mr. ROCHE. She has answered yes.

Mr. HOWE. I move to strike out the answer upon the same grounds.

The COURT. Motion denied.

Mr. HOWE. We note an exception." (Transcript of Record, pp. 252-254.)

We submit that the above questions were highly improper and the replies deeply prejudicial to the defendant Caminetti. Especially is this true when it appears, from the testimony of Marsha Warrington herself, that the defendant Caminetti had nothing to do with this, or any, act of sexual intercourse between Maury I. Diggs and Marsha Warrington, and in fact, so far as the record discloses, knew nothing of this first act of intercourse at or previous to

the time of its commission. Marsha Warrington testified, on cross-examination, as follows:

“At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in one room by ourselves. Mr. Caminetti and Miss Norris were in another room. *I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.*” (Transcript of Record, p. 280.)

Under this state of the record, it must be apparent that the questions should not have been permitted by the trial Judge. The theory upon which the trial Judge based his rulings admitting the above testimony is, we respectfully submit, unsound and fallacious. In the first place, the defendant Caminetti was not on trial for a conspiracy to violate provisions of the “White-slave traffic Act”. In the second place, the sexual relations existing between Maury I. Diggs and Marsha Warrington were totally foreign to the charges made against him, inasmuch as the evidence conclusively establishes that he had nothing whatever to do with the meretricious relations existing between Maury I. Diggs and Marsha Warrington, and, in fact, if we are to believe Marsha Warrington’s testimony, the defendant Caminetti was ignorant of the fact that any act of sexual intercourse had taken place between Maury I. Diggs and Marsha Warrington on the first occasion.

It is significant that the trial Judge, as to other matters, would not permit any evidence relating to

Diggs. For instance, when the defendant attempted to show, by the witness P. J. O'Brien, that the father of Marsha Warrington had threatened to kill any married man who went out with his daughter, and that this threat had been communicated both to Diggs and the defendant, the trial Judge excluded the testimony on the ground that it related to *Diggs*, and not to the defendant *Caminetti*. We set out the proceedings at length in this regard.

"Mr. HOWE. Q. I asked you if you communicated any statement to Mr. Caminetti, in the presence of Mr. Diggs, or to Mr. Diggs in the presence of Mr. Caminetti, that Mr. Warrington had made any threats against both of them?

Mr. ROCHE. That is objected to, your Honor.

The COURT. The witness has testified he made no threats against both of them.

Mr. HOWE. Well, the witness does not know whether Mr. Warrington made any threats. I asked him if he communicated that fact to the defendant and to Mr. Diggs.

The COURT. Do you assume that the witness will testify to things that did not occur?

Mr. HOWE. But he received that information from the uncle of Miss Warrington. I didn't want to ask him that because that is hearsay, but I will ask him about it.

The COURT. You may ask him what other communications he made to this defendant; let him testify to what they were.

The COURT. The objection is sustained.

Mr. HOWE. We note an exception.

Mr. HOWE. Did you communicate any such statement to the defendant Caminetti?

A. I did.

Mr. HOWE. Q. Did you communicate to Mr. Caminetti any statement that Mr. Warrington

would kill any married man that went out with his daughter Marsha?

A. Yes, sir.

Q. What did you say to him upon that subject?

A. I told him that an uncle had been in there and had said that Mr. Warrington was getting wise to Mr. Diggs, and if he ever found him with his daughter he would kill him.

Mr. ROCHE. We move that that entire testimony be stricken out upon the ground that it is hearsay.

The COURT. Let it go out. It is wholly *relevant to Diggs* as the witness states it.

Mr. HOWE. Q. Did you say anything to Mr. Caminetti to the effect that Mr. Warrington had threatened to kill any married man that might be found out with his daughter Marsha?

The COURT. You have asked him that three or four times and the witness in each instance said it was *confined to Diggs*.

Mr. HOWE. His answer was yes to that question.

The COURT. His answer was not yes. When he gave the conversation it relates *solely to Diggs*.

Mr. HOWE. But his answer was yes.

The COURT. Mr. Howe, I don't wish you to keep up a controversy with the court. I have ruled that you cannot ask the question again.

Mr. HOWE. We note an exception." (Transcript of Record, pp. 379-381.)

People v. Becker, 104 N. E. 396, 404.

The rulings of the Court, in this connection, are made the subject of Assignments of Error Nos. 107, 108; Transcript of Record, pp. 78, 379-381; and we now respectfully insist upon the objections made in the trial Court.

XXVI.

The Trial Court Erred in Permitting Marsha Warrington to Testify to Conversations She Had With Maury I. Diggs and Lola Norris not in the Presence of the Defendant Caminetti.

(Transcript of Record, pp. 67, 68, 69, 70, 273, 274, 275; Assignments of Error Nos. 73, 74, 75, 76, 78, 80, 81.)

In order to understand and appreciate the force of our assignments of error in this connection, it is necessary to set out just what transpired at the trial, as follows:

“And so he (Maury I. Diggs) said——

Mr. HOWE. I want to object to this testimony, if your Honor please, as immaterial, irrelevant and incompetent and as not being any conversation had in the presence of the defendant.

Mr. ROCHE. But this was brought out, as your Honor will recall, upon cross-examination by counsel for the defendant.

The COURT. Yes, you asked her about the trip to Jackson.

Mr. HOWE. I asked her about the trip to Jackson, but I didn't ask her anything about *any conversation* about a trip to Stockton.

The COURT. That simply comes out in her explanation as to how it came about that they were taken to Jackson.

Mr. HOWE. Well, she might explain that, but if she is to be permitted to testify to conversation not occurring in the presence of the defendant?

The COURT. If it is a part of the incident, yes, undoubtedly.

Mr. HOWE. We note an exception.

A. He said we would go to Jackson, that it would only take about 2 hours to get there and

we would be back by 11 o'clock and so we consented to go. We didn't get there until nearly 8 o'clock and so we could not get back—it was such a great distance—that we could not get back until after 12, or it might have been 1 o'clock. Had we known in the first place that it was such a long trip we would not have gone.” (Transcript of Record, pp. 273, 274.)

* * * * *

“I recall the levee conversation.

Q. When was that conversation with reference to the time that you left Sacramento?

Mr. HOWE. I object to that as immaterial, irrelevant, incompetent and not redirect examination.

Mr. ROCHE. I think there was some little confusion in the record about that matter, your Honor, and I simply desire to have the matter straightened out.

Mr. HOWE. She was asked to relate all the conversation that occurred during those two weeks.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.” (Transcript of Record, pp. 274, 275.)

* * * * *

“Mr. ROCHE. Q. What was said in that conversation about Mr. Diggs leaving Sacramento, and when?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not redirect.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. He said he would either leave that night or early the next morning.

Mr. ROCHE. What do you mean by that, that he was going to leave that night or the next morning?

A. Yes.

Q. When you left him that night was there anything said between you as to when you would see him again?

Mr. HOWE. The same objection, leading and suggestive.

Mr. ROCHE. Q. What was said when you left him that night?

Said objection overruled by the Court.

Mr. HOWE. We note an exception.

Mr. ROCHE. Mr. Reporter, will you please read the question? (Question repeated by the Reporter.)

A. No, he did not say when he would return.

Q. What did you say to him when you were leaving him?

A. I told him good-bye, because I expected he was going.

Q. When did you next see or hear from Mr. Diggs?

Mr. HOWE. That is objected to as not re-direct examination. The matter was thoroughly gone into in the original case, if your Honor please.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. He telephoned to me the next morning and told me he had not gone.

That was the first knowledge I had acquired that he had not gone. This levee conversation was held on Saturday night." (Transcript of Record, pp. 275, 276.)

"Mr. Diggs and I were alone at the levee conversation. Mr. Caminetti was not there." (Transcript of Record, p. 262.)

The defendant Caminetti was not present at any of these interviews or conversations between Maury I. Diggs and Marsha Warrington, and the trial Judge should not have permitted the introduction of this testimony. It is elementary law that a person accused of crime cannot be bound by the statements made by others without his presence and of which he was unaware.

XXVII.

The Trial Court Erred in Refusing to Permit a Witness Called on Behalf of the Defendant to Testify as to Whether Miss Warrington Did Not Appear Worried or Excited When the Witness Had a Conversation With Her With Reference to a Publication in the Newspaper in Sacramento, the "Bee".

(Transcript of Record, pp. 74, 364; Assignment of Error No. 95).

The proceeding was as follows:

"Q. How did Miss Warrington appear at that time, as to whether or not she was worried or excited, when you had this conversation with her with reference to the publication in the 'Bee'?"

Mr. SULLIVAN. We object to that as immaterial.

The COURT. The objection is sustained.

Mr. HOWE. We note an exception." (Transcript of Record, p. 364.)

We submit that the above question was proper and should have been answered. It was intended to throw light upon the intent and purpose of the defendant in leaving Sacramento in the company of the two young ladies and Maury I. Diggs. It was intended to elicit corroboration of the contention of the defense that the chief motive of the defendant Caminetti and of Miss Warrington in leaving Sacramento was to avoid impending scandal and disgrace and notoriety which they believed, and the others believed, were about to fall upon them as well as threatened publications in a Sacramento newspaper; an intent and purpose entirely inconsistent, obviously, with that denounced by the "White-slave traffic Act" and charged against the defendant in the indictment.

XXVIII.

The Trial Court Erred in Refusing to Permit a Witness Called on Behalf of the Defendant to Testify as to the Effect Upon the Defendant of a Conversation He Had Had With the Defendant.

(Transcript of Record, pp. 75, 371, 372; Assignment of Error No. 100).

On redirect examination, the witness D. T. Leitch, called on behalf of the defendant, was asked:

“MR. HOWE. Q. What effect did that conversation seem to have upon him?

MR. SULLIVAN. We object to the question as immaterial and calling for the conclusion of the witness.

THE COURT. The objection is sustained.

MR. HOWE. If your Honor please, the purpose is to show that he was excited and nervous and worried after the conversation or warnings given him by Mr. Diepenbrock.

THE COURT. I am aware of what the purpose is.

MR. HOWE. We note an exception.” (Transcript of Record, pp. 371, 372.)

It is respectfully submitted that the above question should have been permitted by the trial Judge. The same argument that we have heretofore advanced in this Opening Brief, as to the evidence admissible to show the real intent and purpose of the defendant Caminetti in leaving Sacramento, is applicable here.

XXIX.

The Trial Court Erred in Permitting Evidence to go to the Jury With Reference to the Amount of Salary Due the Defendant When He Left Sacramento and Some Moneys That Were Then Due by Him to the Witness O'Brien, Called on Behalf of the Defendant.

(Transcript of Record, pp. 55, 56, 57, 196, 197, 198, 383, 384; Assignments of Errors Nos. 40, 41, 42, 43, 109, 110, 111, 112, 113, 114).

We respectfully contend that all this evidence, as disclosed by the assignments of error, about the condition of the salary due to the defendant at the time he left Sacramento and his private loans with the witness O'Brien were utterly immaterial, incompetent and irrelevant for any purpose in the case.

XXX.

The Trial Court Erred in Admitting Much Extraneous and Remote Matter, Prejudicial to the Defendant.

(Transcript of Record, pp. 55, 58, 60, 61, 62, 194, 202, 203, 205, 206, 207, 208, 209, 219; Assignments of Error Nos. 38, 39, 45, 46, 49, 50, 51, 52, 53, 54, 55, 61).

The assignments of error set forth the extraneous and remote matters, which we deemed to be wholly incompetent, irrelevant and immaterial.

It would unnecessarily prolong this already too lengthy Opening Brief, to take up each assignment and discuss the errors in detail. Suffice it to say that a perusal of the objectionable matters, permitted by the trial Judge to be introduced in evidence, will show that they related to the purchase of groceries, while the defendant stayed for three days in the bungalow at Reno; to the sale of the groceries, upon his arrest by the state authorities at Sacramento, California; to the condition of the bungalow, immediately previous to its occupancy by the defendant and during his sojourn and upon his departure, and even for some time thereafter.

Not only were all these matters entirely too remote, but they were incompetent, irrelevant and immaterial, for the reason that there was no proper foundation for their admission. We contended, throughout the trial of the case, that before any such proof was admissible, if admissible at all, the prosecution was in duty bound to submit some evi-

dence that the defendant Caminetti had committed some act to transport, or cause to be transported, or aid or assist in transporting Lola Norris or Marsha Warrington, in interstate commerce, from Sacramento, California, to Reno, Nevada. In the absence of any such evidence, and in view of the meagre showing by the prosecution, we respectfully submit that the evidence above referred to, and objected to by the attorneys for the defendant at the trial, should have been excluded and that its admission was error and prejudicial to the defendant.

XXXI.

The Trial Court Erred in Admitting the Testimony With Reference to the Sale of Railroad Tickets and in Admitting the Railroad Tickets Themselves.

(Transcript of Record, pp. 49, 50; Assignments of Errors Nos. 18, 20, 22).

We contend that any reference or testimony to railroad tickets, or the tickets themselves, was inadmissible until the prosecution had offered some evidence showing, or tending to show, that the defendant had committed some act to transport, or cause to transport, or aid or assist in transporting, in interstate commerce, Lola Norris or Marsha Warrington from Sacramento, California, to Reno, Nevada. As already previously argued in this Opening Brief, there is absolutely no evidence that the defendant Caminetti had anything to do with the purchase of the tickets or that he contributed to them in any way, shape or form.

XXXII.

The Trial Court Erred in Admitting Certain Statements Made by Maury I. Diggs, and Which Were Prejudicial to the Defendant Caminetti.

(Transcript of Record, p. 64; Assignments of Error No. 63).

The objectionable questions and answers were as follows:

“Q. What, if anything, did Maury I. Diggs say about it?

Mr. WOODWORTH. We object to that as immaterial, irrelevant and incompetent and in no way binding on this defendant.

The COURT. Q. Was it in the presence of the defendant?

A. Yes, sir.

Mr. WOODWORTH. We note an exception.

Mr. ROCHE. Q. And also in his hearing?

A. Yes, sir.

Q. What was the statement?

A. On the way to the police station from the bungalow, Maury I. Diggs stated that he hoped the Sacramento officers would place him in a strong box when he got to Sacramento, that he was afraid old man Warrington would get him.” (Transcript of Record, p. 222.)

Another objectionable question and answer was as follows:

“Q. What was said by Mr. Diggs to the two girls at that time?

Mr. WOODWORTH. We again object to that statement as immaterial, irrelevant and incompetent, no proper foundation laid and not binding on this defendant.

The COURT. The objection is overruled. The evidence tends to show Mr. Woodworth, that

this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. In such a case it is very much like a prosecution for conspiracy, only here of course it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all but it all goes to the jury for their consideration.

Mr. WOODWORTH. The point we make is that the defendant is indicted here simply for having violated the White Slave Traffic Act. He is not indicted for conspiracy.

The COURT. Mr. Woodworth, I understand the situation thoroughly and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

Mr. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court.

A. Mr. Diggs said to the two girls 'It is up to you girls now whether we go to the pen, or not.'

Mr. ROCHE. Q. And what, if anything, did Mr. Caminetti say?

Mr. WOODWORTH. One moment. I move to strike out the answer upon the same grounds.

The COURT. The motion is denied.

Mr. WOODWORTH. An exception.

A. Mr. Caminetti said 'That is right, girls.'

Mr. ROCHE. Q. And what, if anything, did the two girls say?

A. I don't know which one of them said it, but one said, 'We will stay with you, we will stay by you.' " (Transcript of Record, pp. 216-218; Assignments of Error Nos. 58, 59, p. 63.)

Not only do we contend that the questions asked and the answers elicited were improper, but the theory of the learned trial Judge to the effect that the case at bar was "very much like a prosecution for conspiracy", was erroneous and prejudicial to the defendant. It resulted in the admission of much testimony and evidence that otherwise would never have been admitted. It practically made the defendant Caminetti responsible for all of the acts and statements of Maury I. Diggs and of Lola Norris and Marsha Warrington. It was a radically wrong theory and must have produced in the minds of the jury "confusion worse confounded".

XXXIII.

The Trial Judge Erred in Making a Remark in the Presence of the Jury Deemed to be Improper and to Which Exception Was Taken.

(Transcript of Record, pp. 54, 55, 187; Assignment of Error No. 36).

The remarks of the trial Judge arose as follows:

“Q. Is it a fashionable district or otherwise?”

The COURT. What is the object of this sort of examination?

Mr. WOODWORTH. Counsel will probably contend, may it please the Court, that this was a house away off in the suburbs, all by itself, where these people were in hiding. We desire to show that they were not in hiding at all.

The COURT. *That they were not ashamed.*

Mr. WOODWORTH. We object to the remark of the court and assign that as error.” (Transcript of Record, p. 187.)

We respectfully submit that the remarks made by the trial Judge were prejudicial to the defendant and were unjustified and constitute reversible error.

XXXIV.

The Court Erred in Not Granting the Motion Made on Behalf of the Defendant at the Outset of the Case to Transfer the Trial of the Case to Sacramento, Where the Offenses Were Charged in the Indictment to Have Occurred and Where the Defendant and the Principal Witnesses all Resided.

(Transcript of Record, pp. 48, 143, 147, 148-150, 151; Assignment of Error No. 16).

This motion was made at the proper time and in fact, at the earliest possible stage of the case. While a matter addressed to the sound discretion of the trial Judge, still, in view of the showing made, the motion to transfer should have been granted.

Section 72 of the Judicial Code provides:

“The State of California is divided into two districts, to be known as the Northern and Southern Districts of California. * * * Terms of the District Court for the Northern District shall be held at San Francisco on the first Monday of March, and the second Monday in July, and the first Monday in November; *at Sacramento* on the second Monday in April; and at Eureka on the 3rd Monday in July.”

It was under this section that the defendant Caminetti appealed to the Court to transfer the trial to Sacramento.

The record shows that on July 30, 1913, the defendant was “*first* called for arraignment”. (Transcript of Record, p. 143.) On that day, a demurrer was interposed and one of the grounds urged was

that the defendant should be tried in Sacramento, the place alleged in the indictment where the offenses were committed and where the defendant and the principal witnesses both for the prosecution and the defense resided. The trial Judge was perfectly correct in holding that the motion to transfer the trial to Sacramento was not a ground of demurrer and we acquiesced in his decision upon that point. (Transcript of Record, pp. 143-144.) However, upon that day (July 30, 1913), we advised the Court that we would reserve the right, before the trial came on, "to make a proper showing to the Court for the purpose of trying the case at the place where the crime was alleged to have been committed". And the Court ruled: "Let that be the order." (Transcript of Record, p. 147.) Thereafter, on August 5, 1913, and a considerable time before the trial of the case (which was commenced on August 26, 1913), counsel for the defendant renewed the motion to transfer the case to Sacramento for the purposes of trial. The following proceedings took place in that regard:

"The defendant, F. Drew Caminetti, thereupon moved the Court to transfer the case for trial to Sacramento, in the State of California. The Court thereupon stated that the motion would be ruled upon at the time the case was called.

'MR. WOODWORTH. *But we desire the record to show we made the motion at this time.*'

The Court thereupon stated to counsel for defendant that he could then file the affidavit of the defendant, F. Drew Caminetti, in sup-

port of the motion so that the defendant would be regarded as having made the motion as of this date, viz.: August 5, 1913." (Transcript of Record, p. 147.)

Thereafter, when the case was called for trial in San Francisco, the attorneys for the defendant again renewed the motion to transfer the case to Sacramento for trial, which the trial Judge, after due consideration, denied, and to which exception was taken and this assignment of error now urged. (Transcript of Record, pp. 148, 151.)

The affidavit of the defendant Caminetti, filed in support of the motion to transfer the trial, omitting the caption and attestation, etc., is as follows:

"That he is the defendant in the above entitled action; that the indictment contains four counts; that in each count, the offense is alleged to have been committed by the defendant at Sacramento, State and Northern District of California; that, under and by virtue of Section 72 of the Judicial Code of the United States,— 'terms of the District Court for the Northern District of California shall be held..... At Sacramento on the second Monday in April.'

That this defendant now respectfully demands to be tried at Sacramento, State and Northern District of California; that he invokes his constitutional right to be tried at the place where the offenses are alleged to have been committed, and by the Court duly authorized by law to hold Court at said place where the said alleged offenses are charged to have been committed; that he desires to be tried by a jury selected from the vicinage of the place where said offenses are alleged to have been

committed; that he has a meritorious defense to said accusations made against him;

That his residence, home, and place of business have been, and now are, at Sacramento, State and Northern District of California, and not at San Francisco, where it is proposed now to try him; that most of his relatives and immediate members of his family, friends and acquaintances live in and around Sacramento, California, and not at San Francisco; that to compel him to be tried in San Francisco, California, will greatly and seriously and materially hinder, embarrass and jeopardize the defendant's rights and such defenses as he may deem proper to present, and as this defendant verily believes, and is informed by his counsel, and therefore avers, will deprive him and prevent him from properly and adequately and fully presenting his defense to said charges, and, in that behalf, this defendant deposes that he is without sufficient means to defray the expenses absolutely necessary to subpoena witnesses from Sacramento, California, and elsewhere, to San Francisco; that most of the witnesses required by this defendant to properly present his defenses, reside in Sacramento, California; that they are about 20 in number; that, as this defendant is informed and believes the material witnesses, upon whose testimony the Government relies, live in Sacramento, California; that it would save great expense to the Government, and to the defendant in so far as the presence of witnesses is required, by trying the case in Sacramento, and not at San Francisco; that for the convenience of witnesses, both for the Government and the defendant, and to save great and unnecessary expense, the place of trial of this defendant should be held at Sacramento, and not at San Francisco; that this defendant is absolutely without means to subpoena witnesses from Sac-

ramento, and elsewhere, to San Francisco, and to pay for their transportation, maintenance and subsistence during the pendency of this trial, which, as this defendant is informed and believes, will require at least one week, or ten days; that unless the trial is held at Sacramento instead of San Francisco, this defendant will be deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized, and he will be unable to make proper defense to said offenses, and he might be convicted of offenses of which he is not guilty.” (Transcript of Record, pp. 149, 150.)

The prosecution did not attempt to make a counter showing. Therefore, the statements of fact contained in the affidavit of the defendant Caminetti must be accepted as true, and, under the showing therein made, the trial Judge should have granted the motion to transfer the trial of the case from San Francisco to Sacramento. The indictment alleged that the offenses were committed in Sacramento. The defendant and his family resided in Sacramento. The principal witnesses for the prosecution, Marsha Warrington and Lola Norris and others, resided in Sacramento. Almost every witness called on behalf of the defendant, as a perusal of the transcript of record will show, resided in Sacramento.

Section 72 of the Judicial Code was an express provision by Congress that Court should be held at Sacramento. It was undoubtedly the purpose of the law that all crimes and offenses committed at or near Sacramento should be tried there. This

provision was enacted in the interests of convenience and economy on the part of the government as well as of a defendant, and also in the interests of justice and so as not unnecessarily to harass or jeopardize a defendant's rights by compelling him to go to a distant part of a state (for instance such as is the large State of California), for trial and at great expense to bring his witnesses from their homes to testify. It is fundamental in English and American jurisprudence that one accused of crime is entitled to be tried by a jury selected from the vicinage of the place where the crime is alleged to have been committed. We understand that in other judicial districts motions to transfer for trial are granted as a matter of course. As above stated, the prosecution attempted no counter showing whatever. It is respectfully submitted that the defendant was unreasonably handicapped in his defense in being compelled to go to trial in San Francisco instead of Sacramento, and, as stated in his affidavit, was "deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized and he (was) unable to make proper defense to said offenses". (Transcript of Record, p. 150.) There was no substantial reason to justify the trial Judge in refusing to grant the motion to transfer the trial of the case. The offenses charged, if they were committed at all, took place, as alleged in the indictment, *at Sacramento*. The defendant and his family and all his principal witnesses lived *in Sacramento*. The principal wit-

nesses for the prosecution lived *in Sacramento*. Those that did not, lived in Reno, Nevada, and it was certainly in the interests of economy to the government and also of time that the trial should have taken place *at Sacramento* instead of San Francisco, as Reno is nearer Sacramento than it is to San Francisco by one hundred miles. Considering the averments of the indictment and the allegations of the affidavit of the defendant, which were not denied or controverted by the prosecution, it is respectfully submitted that the trial Judge abused the discretion reposed in him in not granting, upon the mere timely suggestion of the attorneys for the defendant, the motion to transfer the trial of the case from San Francisco to Sacramento.

Section 7 of the bill of rights in the state constitution of 1879 provides that: "The right of trial by jury shall be secured to all, and remain inviolate." This means the right as it existed at common law, and includes *the right to be tried in the county where the crime is charged to have been committed, as well as to having a jury of the vicinage*.

People v. Powell, 87 Cal. 348; 25 Pac. 481.

Conclusion.

In conclusion, we feel that while we owe this Honorable Appellate Tribunal an apology for the length of this Opening Brief, still a perusal of the Transcript of Record, we believe, will justify us in this extended argument. The importance of this case to the defendant and to the immediate members of his family as well as the sincere and conscientious belief of his counsel in his innocence of any wilful, knowing, or felonious violation of any of the provisions of the "White-slave traffic Act" have compelled us, in the interests of justice, to make the above elaborate and painstaking presentation of our views.

The fact, further, that the case seems to be regarded by bench and bar as one *prima impressionis*, in view of the very broad scope and operation of the "White-slave traffic Act" contended for by the prosecution, also impelled us to make a more minute and laborious investigation and argument of the subject than we otherwise would have done, and we crave the indulgence of this Honorable Appellate Tribunal, if we have trespassed too much upon its time and patience.

We have to observe, in closing, that the "White-slave traffic Act" was intended to prohibit the importation of girls and women from foreign countries into the United States, and between the States, for the purposes of commercial prostitution or other forms of commercialized vice. What the Act

aims at is the business or commerce of prostitution and vice, and not cases of private immorality where there is no element of gain or commerce or business. We are not to be understood, for an instant, as commending private immorality, nor apologizing for the defendant Caminetti, as disclosed by the record in this case, but the United States must, and should, leave such cases of private immorality, disassociated from any element of gain or commerce or business, to the regulation of the several states in which such private immorality takes place.

The case at bar, confessedly, involves no feature of gain or commerce or business. It was the rash act of a young man who had no thought of violating any law of the United States. To place him on a level with the professional procurer and to stigmatize him and his innocent children with the terrible taint of "White Slavery" is to commit a crime, we submit, respectfully, worse than any that he may have committed.

He should be dealt with by the local Courts in Sacramento, California, or in Nevada, which are competent to administer justice, and in which, if convicted, he would not have to bear through all his life, and his children after him, the horrible name of having been a "White-slaver".

Indulging in every presumption against the defendant, the worst that he did was to engage in a wild and foolish escapade. The hot blood of youth overcame, not only his judgment, but that of Lola

Norris. The defendant does not belong to the criminal class and he should not be condemned to lasting infamy, but given a chance to redeem himself and become a useful citizen. He should be restored to his family, who have forgiven him. He should be allowed to support his wife and children, as he is now doing, and not be made a criminal upon such a record as is exhibited in the case at bar.

We submit that, in the first place, the judgment of conviction should be reversed and the defendant discharged and permitted to go hence without day upon the ground that (a) the "White-slave traffic Act" is unconstitutional; or (b) that the facts alleged and proved by the prosecution, assuming them all to be true, do not make out such a case as it was the intent and purpose of the "White-slave traffic Act" to cover and punish.

Should this Honorable Appellate Tribunal take the view, contended for by us, as to either one or both of the two above propositions, then, of course, it will be unnecessary to consider the other numerous remaining points advanced by us in support of a new trial.

Should this Court not agree with the contentions made by us, which would result in the complete discharge of the defendant, then we confidently rely upon the errors committed by the trial Judge, entitling this defendant, at least, to a new trial.

In this connection, it is confidently contended that the legal objections urged are sufficient to justify a new trial because of the errors of law committed by

the trial Judge, the insufficiency of the evidence to sustain the verdict, and the utter paucity of the proof to bring the defendant within the letter or spirit of the "White-slave traffic Act."

Finally, it is vigorously and bravely urged that, upon a reading of the entire record, this Honorable Appellate Tribunal will come to the conclusion that the defendant did not have a fair and impartial hearing before the trial Judge.

As said by the Circuit Court of Appeals for the Eighth Circuit in the case of *Pettine v. Terr.* of New Mex., 201 Fed. 489, 494, 497:

"Under the Constitution of the United States, the defendant had the right to a fair and impartial trial of the issues of his guilt or innocence by a jury of his peers without error of law and according to the course of the common law. He had the right to an acquittal of the charge against him unless the legal evidence satisfied the jury, not the Appellate Court, of his guilt beyond a reasonable doubt." * * *

"In criminal cases, where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake the Courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present were not properly raised in the trial court by request, objection, or exception."

Citing:

Wiborg v. United States, 163 U. S. 632, 658,
16 Sup. Ct. 1127, 1197, 41 L. Ed. 289;
Clyatt v. United States, 197 U. S. 207, 221,
25 Sup. Ct. 429, 49 L. Ed. 726;

Crawford v. United States, 212 U. S. 183, 194,
29 Sup. Ct. 260, 53 L. Ed. 465; 15 Ann. Cas.
392;

Weems v. United States, 217 U. S. 349, 362,
30 Sup. Ct. 544, 54 L. Ed. 793; 19 Ann. Cas.
705;

Williams v. United States, 158 Fed. 30, 36, 88
C. C. A. 296, 302;

Humes v. United States, 182 Fed. 485, 486,
105 C. C. A. 158, 159;

People v. Becker, 104 N. E. Rep. 396.

The case just cited, of *People v. Becker*, contains what we deem to be most apposite statements of the law, which should govern the trial Judge in presiding over a criminal trial, for the purpose of securing to one accused of crime a fair and impartial trial. The Court of Appeals of New York used the following pertinent and significant language:

“The rule of discretion to which we have referred as abiding with a trial judge rests for its foundation upon the conception of a judgment exercised at every stage with open mind, fairly and impartially and in the interest of exact justice between people and accused, and when we find extending throughout a trial a series of rulings so repeatedly and consistently adverse to one side even upon reasonable requests as to indicate that the trial judge has yielded, however unconsciously, to a feeling of hostility and with whatever praiseworthy motives to the thought that presumptively justice will be best subserved by generally and constantly denying the requests of one side, we must conclude that there has been a loss of that open-minded discretion and well-balanced judgment which the

law contemplates, and the party who has been injured by such abandonment is entitled to relief. It is at once a compliment and a heavy responsibility, the influence which an able and forceful trial judge may exert in a case of life and death on the minds of jurymen who are alert to discover the impressions produced upon his more experienced mind by the course of the trial, and when his attitude, although unintentionally, seems to portray hostility to and disapproval of one side there can but result an impairment of that free and unbiased verdict which under our system of jurisprudence is regarded as essential to the administration of justice.

“The fundamental demand of our law is that the accused shall have a fair trial, and if that right has been infringed, not in respect to mere technicalities, but in substantial matters, and however undesignedly, he shall have another opportunity to meet his accuser and establish his innocence. That in our opinion is the present case. Under the rulings of the court the defendant did not have that manner of trial which the law guaranteed to him. His counsel was hampered and embarrassed; his case was discredited and weakened; full and impartial consideration by the jury was impeded and prevented. He never had a fair chance to defend his life, and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture. *People v. Wood*, 126 N. Y. 249, 269. 27 N. E. 362; *People v. Barberi*, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; *People v. Davey*, 179 N. Y. 345, 347, 72 N. E. 244; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Freeman*, 203 N. Y. 267, 271, 96 N. E. 413; *People v. Kinney*, 202 N. Y. 389, 397, 95 N. E. 756.

“The principle of what was written by Judge Werner in the Davey case, although said under

other circumstances and in the case of a different crime than murder, is cogently applicable. The case was one where from the nature of the offense charged some of those feelings of popular prejudice and passion were liable to be aroused which it is contended were not lacking in the present case. He wrote: 'There are cases, however, to which apparently technical errors may be so prejudicial as to produce the gravest injustice. This may be particularly true of a case in which a defendant, accused of an abhorrent and detestable crime, finds himself confronted at the very threshold of the courtroom, with that subtle, pervasive, and almost ineradicable prejudice which the bare charge of such a crime may engender against him, in the minds of those who are to pass upon his guilt or innocence. * * * In such cases reason needs to be safeguarded from prejudice by everything that caution and justice can suggest. * * * so that jurors may, as far as possible, be unbiased and impartial.'

"And as was again said by Judge Vann in *People v. Wolf*: 'An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court. * * * the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law.' 183 N. Y. page 472, 76 N. E. page 594."

That serious errors, justifying a new trial, were committed by the trial Judge, is, we respectfully submit, clearly revealed by the record. As was well said by the Circuit Court of Appeals for the Eighth

Circuit, in the case of *Pettine v. Terr. of New Mex.*,
supra (at page 492):

“The legal presumption is that error produces prejudice, and it is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.”

Citing:

Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653;

Peck v. Heurick, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302;

Smith v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717;

Moores v. Bank, 104 U. S. 625, 630, 26 L. Ed. 870;

Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62;

Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299;

Mexia v. Oliver, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602;

Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006;

Railroad Co. v. McClurg, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863;

Association v. Shryock, 20 C. C. A. 3, 11, 73 Fed. 774, 781;

Railroad Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458;

Armour & Co. v. Russell, 75 C. C. A. 416, 144
 Fed. 614, 615, 6 L. R. A. (N. S.) 602;
 People v. Becker, 104 N. E. Rep. 396.

Moreover, in a case like the one at bar, where the evidence against the defendant is "so meagre and so remote," it is the well settled rule that an appellate tribunal will be more exacting and critical in scrutinizing, and more inclined to reverse, the rulings of a trial Judge and grant a new trial, than it would be in a case where the evidence against a defendant is strong or overwhelming.

As said by this Honorable Court, in another very recent case of Peterson v. United States, 213 Fed. 920, 923:

"In the main, we do not find the language used by the lower court objectionable, and we should hesitate to grant a reversal upon this ground alone, *if the record disclosed strong incriminating evidence*, but the circumstances relied upon are *so meagre and so remote that we are constrained to think that the defendant was prejudiced in his rights.*"

Before this Appellate Tribunal can affirm the judgment of conviction now standing against the defendant, it must be "*able to say with certainty*", "*that the defendant was not prejudiced*" by the rulings, remarks and instructions complained of by the defendant.

To use the apposite language of the Circuit Court of Appeals for the Eighth Circuit, in the case of Balliet v. United States, 129 Fed. Rep. 689, 696:

“Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.”

Dated, San Francisco,

October 19, 1914.

Respectfully submitted,

MARSHALL B. WOODWORTH,

ROBERT T. DEVLIN,

Attorneys for Plaintiff in Error.

S. LUKE HOWE,

NATHAN C. COGHLAN,

ANTHONY CAMINETTI, JR.,

Of Counsel.

APPENDIX.

ACT OF JUNE 25, 1910 (36 Stat., 825).

An Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist

in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether

with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 5. That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections.

SEC. 6. That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their dec-

larations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this Act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman

or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procurement to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law

of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section.

SEC. 7. That the term "Territory," as used in this Act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.

SEC. 8. That this Act shall be known and referred to as the "White-slave traffic Act."

Approved, June 25, 1910.

